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An
Exhaustive & Critical Commentary
ON THE
PROVINCIAL INSOLVENCY ACT
V OF 1920
(AS AMENDED UP-TO-DATE)
(With rules and forms made thereunder)

BY
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(Subordinate Judge, Gujar Khan, Punjab.)

WITH A FOREWORD
BY
The Honourable Mr. Justice J. H. MONROE,
High Court, Lahore.

1930

**UNIVERSITY BOOK AGENCY,
LAW PUBLISHERS,
KATCHERY ROAD, LAHORE.**

Price Rs. 2

Printed at the Lahore Art Press, by L. Ram Bheja Kapur, Printer

AND

Published by Mr. Rameshwar Dial, Sub-Judge Gujar Khan.

To the Memory
of
My Father

FOREWORD.

Mr. Rameshwar Dial has done me the honour of asking me to write a preface for his commentary on the Provincial Insolvency Act. After a careful reading of a considerable part of the commentary, it gives me great pleasure to do so.

The mode of arrangement is that now usually adopted in text books on statute law and is one of great convenience for the practising lawyer ; each section is separately annotated, and the notes to each section contain full cross references to the notes on other sections.

The notes are both full and clear ; and I feel safe in saying that the author's work reaches that high standard of annotation which we have come to expect in modern law books.

I need not dwell on the difficulties of annotating an Indian Act which is largely based on an English Act, but which does not closely follow the model. The English decisions cannot be ignored, but they must be used with great discretion. Mr. Rameshwar Dial has been singularly successful in his use of them and his notes, in which he marks the differences in Indian Law and English Law are remarkably concise and clear.

With confidence I recommend this book to all members of the profession and more particularly to those, who have not at hand sets of law reports.

High Court,
Lahore,
13th March 1939. }

J. H. Monroe.

PREFACE.

This book is intended to meet the requirements of the legal practitioners and the students alike. Cases of Insolvency are of frequent occurrence in the Indian Courts and practitioners, both seniors and juniors, have usually opportunities to conduct them. The Provincial Insolvency Act is included in the syllabus for the Law Examination of every University in India and in most cases the student is required to obtain a detailed knowledge of the Act.

The law of insolvency in India has been one of continuous growth. From time to time the legislature intervened to remove defects which were found in actual practice. The process in the Muffosils started with Chapter XX of the old Code of Civil Procedure and the eleven sections of the Punjab Laws Act; it finally culminated in the present Act, which too has been amended in many matters by subsequent legislation. To explain this, the history of each section has been given at the beginning of the commentary on it. It is hoped that it shall not only help the reader to know its past but also enable him to understand its practical working.

The references to analogous Acts under each section will help the reader to make use of the decisions given under those Acts. The Provincial Insolvency Act, though modified to suit the conditions prevailing in India, is mostly based on English Law. The Presidency-towns Insolvency Act, with slight variations, follows the English Acts more closely. The English cases cited in the book will make a large body of case-law available to the average lawyer who has no access to the English Law Digests and Reports. The citation of cases decided under the English Law and Presidency-towns Insolvency Act will also be made easier and more useful by a thorough understanding of the differences existing between the provisions of the various Acts. The comparative table showing the various sections of these Acts has also been given on pages *cvi to cviii* to facilitate easy reference.

The interpretation of the Act by the Indian High Courts has resulted in conflicts of decisions on many points. An attempt has been made to discuss at length the arguments for and against a particular opinion and in some cases I have ventured to express my own views. To make particular mention of some of these points I may refer to (1) jurisdiction of Indian Insolvency Courts over non-resident foreigners (pages 74—75, 81-82, 134—138) (2) effect of annulment of adjudication under section 43 on proceedings and powers of courts (Pages 354—359) (3) the nature of the period of three months prescribed in sections 9 and 54 and the possibility of its being extended by the court (pages 101—107) and (4) the starting point for counting the period of three months in the case of registered deeds of transfers (pages 107—112).

The law relating to the vesting of joint Hindu family property (pages 204—209), the adjudication of the partners in the firm name (pages 84—87) and the extension of the period fixed for applying for discharge (pages 191—194) may be taken to be well settled now. In respect of these the conflict, which once existed and has not altogether ceased even now, has, however, been noticed in detail.

The Addenda brings the case-law upto the beginning of March 1939. The insolvency rules recently revised by the Lahore High Court have been incorporated with the rules framed by other Courts under section 79 of the Act.

It is always a pleasure to acknowledge one's thanks to persons whose valuable help has made one's task easy and successful. I am greatly indebted to the authors of standard works available on the subject in the market, particularly to Mr. Williams, whose Bankruptcy Practice is a legal classic in English Law. I have also availed of the many valuable discussions found in the original reports, both English and Indian.

I cannot sufficiently thank the Hon'ble Justice J. H. Montee of the Lahore High Court who was kind enough to write a foreword for the book. His Lordship's appreciation of the work, coming as it does from such a high authority, makes me confident in placing this humble effort at authorship before the legal profession. It is my earnest hope, which is strengthened by the encouragement which His Lordship has given, that the reader will find this work a valuable contribution to a difficult branch of the law, in originality of the subject-matter, its treatment and mode of arrangement. All the same I am not unconscious that there might have been committed some mistakes. For them I crave the reader's indulgence. And suggestions pointing them out or intended to otherwise improve the utility of the book in subsequent editions, shall be thankfully received.

My thanks are also due to S. Trilochan Singh, M.A. LL.B. Pleader. Gujarkhan, who helped me in reading the proofs and preparing the table of cases. I am also grateful to L. Rambheja Kapur of the Lahore Art Press, Lahore, who gave me every possible accommodation while the book was being printed.

GUJARKHAN,

6-4-39.

RAMESHWAR DIAL.

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39	27 (7)	30	3 (11), (12), (14) (of B. A. 1890) 19.	16 (11), 12, (14), 17
40	27 (8)	31	3 (15) (of B. A., 1890)	16 (15)
41	44 (1), (2)	38 (1), 40 (2)	8 of B. A. of 1890.	26 (7)
42	44 (3) to (5)	39	...	...
43 (new)	...	41	35 (2), (3)	29 (2), (3)
44	45	45	30	28
45	29	Sch. II, r. 24	Sch. II, r. 21	Sch. II, r. 22
46	30	47	38	31
47	31	Sch. II, r. 9, r. 11, r. 15	Sch. II, rr. 9, 10, 15.	Sch. II, rr. 10, 12, 16.
48	32	Sch. II, r. 23	Sch. II, r. 20	Sch. II, r. 21
49	25	Sch. II, r. 2	Sch. II, r. 2	Sch. II, r. 2
50	26	Sch. II, r. 26, Sch. II, r. 27.	Sch. II, r. 25	Sch. II, r. 26
51	34	53	45, 46 (3)	40
52	35	54	11 of (B. A. 1890).	41
53	36	55	47	42 (1), (4)
54	37	56	48	44 (1), (2)
54-A (new)	...	...	cf. 47, 48	cf. 42 (1), (4), 44 (1), (2).
55	38	57	49	45
56	18	77	91, 50, 51, 81 (2) 21 (2), 66, 72.	81, 62, 49, 87 (2), 19, 70, 82.
57	19	81	72	82
58	23	...	...	...
59	20	68	56, 57, 58 Sch. II, r. 23.	55, 56, 62 Sch. II, r. 24.
59-A (new)	...	36	17, 2 (of B. 27 A. 1890)	15 25
60	21	...	...	...
61	33	49	40 (3) to (5)	33 (6) to (8)
62	39 (1), (2)	71	60	64
63	39 (3)	72	61	65
64	39 (4)	73	62	67
65	39 (5)	74	63	68
66	40	75	64	57, 58
67	41	76	65	69

Comparative Table of Analogous Acts

P. I. A., 1920 Ss.	P. L. A., 1907 Ss.	P-t. I. A. 1907 Ss.	B.A., 1883 Ss.	B. A. 1914 Ss.
67-A (new)	...	88, 89	22 (1), 5 (of B. A., 1890)	20 (1)
68	22	86	<i>cf.</i> 104, 90	<i>cf.</i> 108, 80
69	43 (2)	103	24	22, 108 (3)
70 (new)	...	104	...	...
71 (new)	...	105	167	162
72	53	102	31	155
73 (new)	...	103-A	...	...
74	48	106	121	129
75	46	8 (2) (b)	<i>cf.</i> 104	<i>cf.</i> 108
76	49	90 (2)	105	109
77	50	126	118	122
78 (new)	...	...	...	...
79	51	112, 113	115, 127 (1)	119, 132 (1)
80	52	<i>cf.</i> 6.	<i>cf.</i> 99	<i>cf.</i> 102
81	54	...	...	...
82	55	...	...	...
83	56	...	...	...

ADDENDA.

Section 1.

Page 13. An order of adjudication made in Calcutta after separation of Burma is not sufficient to vest under section 17, Pt. I. A., in the official assignee of Calcutta immovable property of the insolvent in Burma. *In the matter of Moti Ram Premasukhdas*, A. I. R. 1938 Rang. 324 : 1938 R. L. R. 166.

Section 4.

Page 25. Section 4, P. I. A., comes into play only after adjudication. A decision in a summary inquiry under section 24 as to whether a debtor is entitled to present a petition for adjudication is not *res judicata* under section 4. *Sadhu Ram v. Kishori Lal*, A. I. R. 1938 Lah. 490.

Page 25. The scope of section 4 (2) is not limited to the Insolvency proceedings only but the decision of the Court is final for all purposes. A decretal amount which has been declared to be fictitious in proceedings on an application by the judgment-debtor for being declared insolvent to which the decree-holder was also a party cannot be recovered by an execution of that decree. The decision of the Insolvency Court is tantamount to a declaration that the decree was non-existent and the finding is binding on the judgment-debtor as well as the creditor, even though the insolvency proceedings have been dismissed. *Sadhu Ram v. Kishori Lal*, A. I. R. 1938 Lah. 148. This case which is a single bench ruling was set aside in Letters Patent appeal reported as *Sadhu Ram v. Kishori Lal*, A. I. R. 1938 Lah. 490 *supra*.

Page 26. Footnote 4. The Insolvency Court has jurisdiction to inquire into *mesne* profits payable by a transferee, a transfer in whose favour by the insolvent has been annulled. *Kisan Lal v. Dina Ji*, A. I. R. 1938 Nag. 50 : 20 N. L. J. 271 : 172 I. C. 573.

Page 26. Where a decree-holder deliberately kept back from the executing Court, the knowledge of the pending insolvency proceedings by the judgment-debtor and the object of such suppression of facts from the Court was to get on with the execution case and purchase the property himself to the loss of other creditors, who otherwise had to share equally with him, it amounts to fraudulent conduct on the part of the decree-holder purchaser and he cannot get the benefit of section 51 (3). Such a sale can be set aside by the Insolvency Court under section 4. *Cheedalla Polamma v. Official Receiver, Nellore*, A. I. R. 1938 Mad. 718 : 47 M. L. W. 676, 1938-1 M. L. J. 781, 1938 M. W. N. 540.

Page 26. A purchaser preferred a claim on the basis of the purchase from the insolvent to the property which was attached in execution of a money decree. That claim was not investigated but was dismissed for default. It was held that as the order dismissing the claim for default was neither final nor conclusive, it was not only expedient but necessary that the question of title to the property in question should be decided in a suit or subsequent proceedings under section 4 of the Act. *Gobardhan Chander v. Kamai Lal*, A. I. R. 1938 Cal. 373.

Page 26. An Insolvency Court is not competent to annul a transaction entered into more than two years prior to the petition for

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insolvency which is voidable under the ordinary law of section 53, T. P. A. The reason is that sections 53 and 44, P. I. A. do not merely lay down a rule of evidence but also confer jurisdiction on the Insolvency Court and hence limit the operation of section 4. Such transactions must be challenged by separate proceedings in a Civil Court. Even on the view that proceedings under section 4 should be held to be tantamount to a suit under section 53, T. P. A. it would follow that the suit would have to be within time when the Insolvency proceedings began. This would be 5 years under Art. 140, Limitation Act from the date of accrual of the cause of action. The view of Justice Sen in A. I. R. 1929 Allahabad 105 was approved. *Godbole v. Hst. Nambai*, A. I. R. 1938 Nag. 546.

Page 33. A court should decide question of title only in very simple cases. Where there is real difficulty or dispute as to title, parties should be referred to a regular suit. *Ram Yadho v. Dhehal Jana* A. I. R. 1938 Nag 247. following A. I. R. 1929 M. d. 705 (F. B.) and A. I. R. 1932 Mad. 167.

Section 6.

Page 65. An execution sale to constitute an act of insolvency is complete when the property is sold and not when the sale is confirmed. *Lalchand v. Bogharan*, A. I. R. 1938 Lah. 819.

Page 66. The phrase, "Decree for the payment of money" in Clauses (e) and (h) means a decree that is personally enforceable against the debtor. The sale of property in execution of a decree passed against a person in his capacity as the legal representative of another is not an act of insolvency. *Kamla Bai v. Chitra Prasad*, A. I. R. 1938 All. 59.

Page 68. Where a debtor said that if his offer of composition was not accepted he had no other assets whatsoever and there was nothing else that he could give to his creditors, even if there was no definite statement by the debtor that he would have to file his insolvency petition, his statement was a statement which could lead creditors to infer only that he intended to suspend payment of his debt and therefore it amounted to an act of insolvency. *Chuan Seng and Co. v. Aster and Co.*, A. I. R. 1938 Rangoon 475.

Page 78. In the case of a joint Hindu family firm a fraudulent transfer by the managing partner of firm's property to pay debts due by the firm is an act of insolvency on the part of other partners also. The managing partner is an agent within the explanation to section 9, Pt. I. A. *Bhawani Das v. Jeth Singh*, A. I. R. 1938 Sind. 82.

Section 7.

Page 81. A foreigner cannot be adjudged insolvent in British India unless an act of insolvency is committed by him during his personal residence in India. *Ganesh Narain v. Raja Pratap Girji*, A. I. R. 1938 Bom. 151. (English Case Law discussed; *Cook v. Charles A. Voglar*, 1901 A. C. 102 followed.)

Page 84. A firm is not a legal entity and a firm cannot be adjudicated but the partners of the firm can be adjudicated in the firm's name. *Chuanseng and Co. v. Aster and Co.*, A. I. R. 1938 Rangoon 475.

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Section 9.

Page 92. Footnote 3. A creditor need only prove his right to present the petition for insolvency. It is not necessary for him to prove the debtor's inability to pay debts *Dasarathi Dasi v. Dasari Venkobayya*, A. I. R. 1938 Mad. 489.

Page 97. The law is that there must be a debt of Rs. 500 or upwards existing not only at the time when the petition was presented, but at the time of the hearing of the petition and at the moment of time immediately prior to the making of an order of adjudication. *Ahmed Mohammad v. Prabhulla Nath*, A. I. R. 1939 Cal. 35, a case under Presidency Town Insolvency Act.

Page 102. *Et. Seq.* The period of three months fixed by section (1) (c) of the Act is not a period of limitation but constitutes a condition of an adjudication, and consequently where the alleged act of insolvency has taken place more than three months prior to the presentation of the petition it cannot be set up as a ground for adjudication, even though the period of three months may be expiring on a day when the Court is closed. *Kummarappa v. Chidambaram*, A. I. R. 1938 Mad. 898.

Page 102. *Et. Seq.* Where the period of three months prescribed for making an application under section 54, P. I. A., expires during the vacation and the application is presented on the date on which the Court reopens after the vacation, such application is competent under section 4, Limitation Act and section 10, General Clauses Act. The application is governed by principles bearing on the construction of statute of limitation as contra-distinguished from a fiscal enactment such as the Court-fees Act. *Seth Balkisen v. Bhanu Prasad*, A. I. R. 1938 Nag. 454.

Page 107. *Et. Seq.* In the case of a compulsorily registrable mortgage the period of three months in sections 54 commences from the date of its execution and not from the date of its registration. *Rama Nanda v. Pankaj Kumar*, A. I. R. 1938 Cal. 417, dissenting from A. I. R. 1933 Mad. 185 and A. I. R. 1934 Rang. 216.

Page 109. Footnote 5 The three months, period contemplated in section 54 runs from the date of the registration of the transfer deed because it is from registration that the transfer becomes effective and the title passes from the transferer to the transferee. *Seth Balkishen v. Bhanu Prasad*, A. I. R. 1938 Nag. 454, following A. I. R. 1937 Nag. 197.

Page 112. A gift is not valid and complete unless it is accompanied by delivery of possession of the subject of gift from the donor to the donee. In such a case the act of insolvency occurs within the meaning of section 9 (c), P. I. A., when possession of property is handed over to the donee. *Singha v. Chiranjivlal*, A. I. R. 1939 Lahore 35.

Page 113. A petitioning creditor in his petition for his debtor's adjudication as insolvent relied on certain acts of insolvency which were committed within three months of the commencement of Court vacation. The petition was filed on the date when the Courts reopened and finding that the alleged acts of insolvency were not within three months of the date of filing, the period of vacation being of no avail to him, he filed another petition for the amendment of the former by alleging new acts of insolvency within three months of the date of filing as required. It was held that although Courts could liberally allow amendments of insolvency

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petitions just as in the case of Civil Procedure Code yet it had its own limitations and an amendment which substituted a new cause of action should not be allowed. *Palamappa Chettiar v. Chidambaram Chettiar*, A. I. R. 1938 Mad. 53.

If the effect of the amendment is to introduce creditors as petitioning creditors who could themselves present the petition after the three months have elapsed, or, in other words, if its effect is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded, the Court would not grant leave to amend. But if, on the contrary, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add a party, the case stands entirely on a different footing. A petition was presented by a person who described himself to be creditor of the insolvent. He alleged that certain amounts were due by the insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that he founded his claim to be solely entitled to the debt. The petition was filed on 24th November, 1930, but on that date an arbitration inquiry was pending in regard to the dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on 29th November, 1930, the petitioner became solely entitled to the debt on which the insolvency petition was founded. It was held that the petitioner could be allowed to amend his petition and proceed with it. *Chockalingam v. Muthiah*, A. I. R. 1938 Mad. 54.

Section 14.

Page 142. Where the order passed on the application of the creditor for withdrawal was merely "filed" it cannot be said that those men were expressly allowed to withdraw. It simply means 'left on record', and other creditors are entitled to be substituted as petitioners under section 16. *Raghuraj Singh v. Abdul Rahman*, A. I. R. 1938 Oudh 206.

Section 16.

Page 147. Footnote 1. Where the petitioning creditor arrives at some arrangement with the debtor and declines to prosecute the insolvency petition, an order of substitution should be made. An express order of substitution is not necessary and it can be inferred from the Court continuing proceedings at the application of the creditor applying to be substituted under the section. Substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on. *Raghu Raj Singh v. Abdul Rahman*, A. I. R. 1938 Oudh 206; *Sagar Mal v. Abdul Rahman*, A. I. R. 1938 Oudh 101.

Section 20.

Page 155. When the Court appoints an interim receiver it should mention the powers to be exercised by him. *Patit Paben Dao v. Hari Sadhan*, A. I. R. 1938 Cal. 182.

Section 21.

Page 161. Before adjudication the debtor continues in possession of the property and he is, subject to the provisions of the Act, entitled to deal with it like any other owner. In order to prevent alienations and waste, the Insolvency Court is empowered under section 21 (2), P. I. A., to order attachment by actual seizure of the whole or any part of the

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property in the possession or under the control of the debtor provided the conditions laid down in the proviso to the section obtained. These powers of attachment are not as wide as powers of attachment possessed by Civil Court under the Civil Procedure Code. After adjudication the position changes entirely. The whole of insolvent's property vests in the Court or the receiver and it or he has the right to actual physical possession thereof and to enforce that right it or he can act under section 53 (3). *Jasodobai v. Firm Shri Krishen Radha Kishen*, A. I. R. 193 Nag. 10.

Section 23.

Page 169. Footnote 5. The mere fact that the husband has been adjudicated insolvent does not constitute sufficient cause for non-payment of maintenance under section 488, Cr. P. Code. *Shyam Charan v. Anguri Devi*, A. I. R. 1938 All. 253.

Section 24.

Page 176. A debtor's petition should not be dismissed simply because some of the debts mentioned in the schedule of liabilities are fictitious. *Sadhu Ram v. Kishori Lal*, A. I. R. 1938 Lah. 490. An insolvent had included in his petition fictitious debts for which no consideration had passed. A large part of the property which the creditor claimed to be available for the purpose of paying petitioner's debts had been ostensibly transferred by three deeds of sale which were fictitious. Taking into consideration these facts it was found that the asset considerably exceeded the liabilities and the petitioner was able to pay his debts. It was held that the adjudication of the petitioner in insolvency should be annulled. *Rajendra Prasad v. Nageshwar*, A. I. R. 1938 Pat. 358. In the case last cited the Privy Council case of *Chhatrapati Singh v. Kharag Singh*, Pat. 4+ I. A. 11 was distinguished. It is submitted on grounds which are not quite satisfactory.

Section 25.

Page 183. Deposit by the debtor of the amount of debt due to the petitioning creditor is not a sufficient cause within the meaning of section 25 for the dismissal of the creditor's insolvency petition. *Bhawan Das v. Jeth Singh*, A. I. R. 1938 Sind 82.

Section 26.

Page 188. The question whether a petition was frivolous or vexatious need not be decided at the time of its dismissal under section 25 (1). The Court can do so on a separate application. The word "debtor" as used in the section includes every person against whom a petition for insolvency has been made, irrespective of the fact whether that person was ultimately found to be owing any debt to the petitioning creditor or not. A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family presented a petition in insolvency against the father and his two sons to have them declared insolvents. About four months later, on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under section 25. The sons claimed compensation under section 26 of the Act. It was found on evidence that the debt was one binding on the family for which the sons' share could be made liable and that within ten days immediately after a notice demanding payment of the debt was made by the creditor

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the sons together with their father had set about alienating a large portion of the family property and that they had no ready money to pay the debt. It was held that under the circumstances the creditor had sufficient grounds to reasonably support that fraud was being attempted by the sons also and therefore it could not be held that the petition of the creditor against the sons was frivolous or vexatious and that therefore no compensation was recoverable. *Rama Swamy Iyar v. Subramania Chettiar*, A. I. R. 1938 Mad. 267.

Section 27.

Page 191. The Court has powers to extend time under section 27 (2), P. I. A., to apply for discharge even after the expiry of the period originally fixed. *Bishan Chand v. Kisen Lal*, A. I. R. 1939 Nag. 103.

Page 192 Footnote 6. The cases mentioned in footnote 6 have been overruled in *Fazal Azam v. Umanath Bux*, A. I. R. 1938 Oudh 122, where it was held that, on the expiry of the time fixed for applying for discharge the annulment of the adjudication does not automatically take place and that the Court can extend the time already fixed before the order of annulment is passed.

Section 28.

Page 208. In a joint Hindu family consisting of brothers, on the insolvency of the brother manager, the shares of other brothers do not vest in the official receiver, when he is adjudged insolvent for debts due personally from him. *Kisen Lal v. Lal Chand*, A. I. R. 1938 Lah. 20.

Page 210. A business firm during the course of business set aside certain sums towards charity for a temple deity and agreed to keep it with them as deposits under their control and pay towards charities whenever required to the trustees of the temple deity. When the business firm was adjudicated insolvent it was contended by the trustees of the temple that the deposits held by the firm towards charities made the firm a trustee with the temple trustees as its beneficiaries. It was held that to covenant to pay money to trustees does not make one a trustee, and that it merely disclosed an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. *Sooni Ram v. Alagu Nachiyar Poir*, A. I. R. 1938 Privy Council 259.

Page 230. The extent to which the salary of an insolvent does not vest in the receiver is to be determined by the state of section 60, as it stood on the date of adjudication. An insolvent adjudicated on 3rd April, 1937, cannot claim the benefit of Civil Procedure Code (Amendment) Act, IX of 1937. *Janendar Kumar v. Akash Chandra*, A. I. R. 1938 Cal. 325.

Page 232. The money of the provident fund vests in the receiver as soon as it reaches the hands of the subscriber. *Marten v. Dutt*, A. I. R. 1938 Nag. 408.

Page 244. An insolvent after his adjudication is not entitled to institute a suit in regard to the property which has vested in the official receiver but he is not debarred from making an application for execution of a decree which he had obtained before an order of adjudication was passed against him. *Sankar Narain v. Yegnalakshmi*, A. I. R. 1939 Mad. 196.

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Page 250. An order of discharge does not divest the Official Receiver of the property placed in his hands for distribution amongst creditors. The Insolvency Court does not become functus officio as soon as the insolvent is discharged for it is not necessary for the Court to wait until all the assets of the insolvent have been realized and distributed amongst the creditors in order to discharge the insolvent. *Mahange Lal v. Firm Suraj Parsad Chandu Lal*, A. I. R. 1939 All. 114.

Page 250. An order of discharge does not terminate insolvency proceedings. A creditor decree-holder, even though he had no notice of insolvency proceedings and the order of discharge, cannot make an application for execution in the civil court. His only remedy is to have recourse to the Insolvency Court. *Bishen Chand v. Kisan Lal*, A. I. R. 1939 Nag. 103.

Page 250. Footnote 3. An adjudication was made some time after the death of the insolvent. After adjudication the creditor of the deceased instituted a suit without leave of the Court against the son for recovery of the debts due by the deceased father and attached the son's share. The son was sued as a legal representative of the deceased father and the claim was only against the family property in his hands. It was held that the suit was against the property of the insolvent in the hands of the son though the properties were family properties in which the son had his own share and that the suit contravened the provisions of section 28. *Baluswami Naidu v. Official Receiver, Madra*, A. I. R. 1938 Mad. 752, distinguishing A. I. R. 1934 Mad. 217.

Page 252. A defendant who had made a trust deed of some of his property in favour of himself and some relatives, was adjudicated an insolvent more than two years after the trust deed. A suit by a creditor under section 53, T. P. A., was held not maintainable without the leave of the Insolvency Court. *Ganpat Rai v. Jahangir*, A. I. R. 1938 Bom. 469.

Page 253. Footnote 8. Leave is necessary even to enforce a personal remedy against the insolvent. *Narain Iyer v. Kandem*, A. I. R. 1938 Mad. 643.

Page 255. Where a notice of application for leave is granted only to the official assignee, and the insolvent is neither made a party thereto nor served with a notice thereof, it cannot be said that the insolvent has no interest to safeguard or that the appearance of the official assignee is sufficient to enable the Court which deals with the considerations applicable to the insolvent personally as well as with the application as against the official assignee. Hence leave granted against the official assignee cannot be so construed as to authorise a suit against the insolvent. *Narayan Iyer Kandem*, A. I. R. 1938 Mad. 643.

Page 281. In the case of a mortgage of a book-debts the only appropriate way to put an end to the assignor's reputed ownership of the book-debts is for the assignee to give notice to debtors. If he does not do so, he *prima facie* leaves them and voluntarily leaves them—in the order, disposition and reputed ownership of the assignor. *In the matter of Avied Stephons*, A. I. R. 1938 Rang. 1. The phrase "possession, order or disposition" is used disjunctively in the section. In the case of a trade-debt the ordinary and appropriate method by which the true owner may termi-

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nate his consent to the debt remaining in the possession, order or disposition of the insolvent is by giving notice to the debtor and the fact of no notice having been given to the debtor is conclusive evidence of the consent of the true owner to the debt remaining in the reputed ownership of the bankrupt, unless failure to obtain possession of the debt is not attributed to any fault of the real owner. This must, of course, be the case where nothing occurs to alter the circumstances in which the insolvent has the reputation of ownership. *Balthazar and Son Ltd. v. Official Assignee*, A. I. R. 1938 Rang. 426.

Page 286. Before the intervention of the Official Assignee all transactions by the insolvent in respect of after acquired property *bona fide* and for value are valid against him. *Solomon David v. The King*, A. I. R. 1938 Rang. 245. a case under Pt. I. A.

Page 287. The rule of *Cohen v. Mitchel* does not apply under the Provincial Insolvency Act. *Martin v. Datt*, A. I. R. 1938 Nag. 408.

Page 298. Section 28 (7) enunciates the English doctrine of relation back. The only difference is as to the time when the insolvency commence. *Nagarur Sambayya v. Nagarur Peddar Subbayya*, A. I. R. 1930 Mad. 19, case law discussed.

Section 30.

Page 306. Failure of publication of the order of adjudication in the Gazette is a mere irregularity and does not vitiate the order itself. *Bisan Chand v. Kishan Lal*, A. I. R. 1939 Nag 103.

Section 33.

Page 316. No judgment or decree is binding on the insolvency court. The court will not, should not, however ordinarily go behind the decree unless it has reason to believe that the decree was brought about by fraud or collusion or is unjust. Relying on *in Re Lennox*, 16 Q. B. D. 315 and *in re Van Laun*, 2 O. B. D. 23. On facts it was held that the insolvency court was entitled to go behind the decree. *Chockalingam Chettiar v. Palniappa Chettiar*, A. I. R. 1938 Mad. 947.

Section 34.

Page 327. R was adjudicated insolvent in 1933. His wife in whose favour a decree had been passed in 1932 awarding her a mahar and maintenance filed an execution proceeding in 1934 for the arrears of maintenance which were then due and prayed for execution of her decree by arrest of R. It was held that the decree was provable in insolvency and the insolvency court's leave was necessary for its execution. *Hanibabeebi Ammal v. Syed Munur Deen*, A. I. R. 1939 Mad. 183.

Section 37.

Page 352. By the annulment of adjudication it does not necessarily follow that the insolvent is to get back from the control of the court his assets. Where the insolvent's property is sold by the receiver with the sanction of the court before annulment, the receiver has the power to execute the sale deed even after the annulment. *Waziry v. Mathra Parsad*, A. I. R. 1939 Oudh 55.

Page 357. Proceedings under sections 53 and 54, P. I. A., cannot be started or continued after annulment of adjudication. *Suleman v. Laxman*, A. I. R. 1938 Nag. 312 following A. I. R. 1933 Rang. 223.

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Page 359. A vesting order under section 37, P. I. A., can be passed subsequent to the order of annulment. *Baluswami Naidu v. Official Receiver, Madra*, A. I. R. 1938 Mad. 752.

Section 41.

Page 379. Omission to give notice of the application for discharge as required by section 41 (1) is no irregularity if none of the creditors proved his debt. The notice is only required to be given to those creditors who prove their debts. *Bishun Chand v. Kisan Lal*, A. I. R. 1939 Nag. 103.

Section 42.

Page 389. The burden of proving existing circumstances laid down in section 32 (1) (a), P. I. A., is on the debtor. *Ahmad Maraikayar v. Thangia Nadir*, A. I. R. 1938 Mad. 590.

Section 44.

Page 409. An order of discharge releases the insolvent from personal liability under a mortgage where the mortgagee realised his security before the order of discharge and did not prove for the balance. *Haveli Shah v. Hussein Jan*, A. I. R. 1938 Lah. 217.

Page 411. Acts done by an insolvent subsequent to his discharge are not invalid. But the court may in some circumstances revoke the discharge. *Hashim v. Chhotatal*, A. I. R. 1938 Rang. 11, a case under Pt. I. A.

Section 49.

Page 444 Mere inclusion of a debt by the insolvent in the schedule of debts filed by him along with the insolvency petition does not make the debt proved. *Vela Galetti Veeraya v. Kandepu Narasinhara*, A. I. R. 1938 Mad. 142, following A. I. R. 1934 Mad 465. The mode of proving a debt mentioned in section 49 is not the only method. *Bhoder Mal v. Haji Mohammad Ali*, A. I. R. 1938 Pat. 65.

Page 444. Footnote 3. Admission of debt by the insolvent in his petition for adjudication is not a sufficient proof of debt and it cannot save limitation under section 78, P. I. A. *Fazal Azim v. Tulsi Ram*, A. I. R. 1938 Oudh 8, dissenting from A. I. R. 1929 Cal. 159.

Section 50.

Page 446. An appeal by the debtor lies from an order of the district court declaring the debt to have been proved in proceedings under section 50. *Makhan Lal v. Bhagwan Singh*, A. I. R. 1938 Pat. 471.

Section 51.

Page 464. Section 51 (3) does not operate in case of sales held after adjudication. *Bachu Mallikarjuna v. Official Receiver, Kistna*, A. I. R. 1936 Mad. 449, case law discussed.

Page 468. Where a decree-holder deliberately keeps back from the executing court the knowledge of pending insolvency proceedings by the judgment-debtor and the object of such suppression of facts in the court is to get on with the execution sale and purchased the property himself to the loss of other creditors who otherwise would have shared equally

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with him, it amounts to fraudulent conduct on the part of the decree-holder purchaser and he cannot get the benefit of section 51 (3). Such sale can be set aside under section 4. *Cheedallapolamma v. Official Receiver*, A. I. R. 1938 Mad. 718.

Section 52.

Page 467. A sale of the property until the order of adjudication is not prohibited in spite of the presentation and the admission of an insolvency petition, but the creditor is not given the benefit of the remedy had by him. The law also protects the title of a *bona fide* auction purchaser to the property sold in auction in spite of the fact that there has been an order of adjudication subsequent to the sale because of section 51 (3). The doctrine of relation back as enunciated in section 28 is subject to the exception enacted in section 51 (3).

Notice of insolvency to the decree-holder cannot connote to him want of good faith nor this fact can preclude him from proceeding with the sale and purchasing the property himself. The only disability under which he lies is that he cannot set off the amount of the decree-debt against the purchase price, but he is bound to pay the amount of the purchase money into court and share in the sale proceeds rateably along with the other creditors. *Mamidy China Venkata v. Nekkainti Surya Narayan*, A. I. R. 1938 Mad. 906.

Page 473. Footnote 3. The section does not apply where a receiver is not appointed and a court executing a decree passed against the insolvent need not stay its hands. *Nagendar Lal v. Himanta Kumar*, A. I. R. 1938 Cal. 503.

Section 53.

Page 480. The primary *onus* is on the receiver though real facts are known to the insolvent. However after a *prima facie* case is proved the insolvent's evidence and his attitude become important in judging the truth of the story of his good faith. *Kisen Gopal v. Umarao*, A. I. R. 1938 Nag. 216.

Page 480. The *onus* of proof under section 53, P. I. A., is on the receiver. He has to prove not that the insolvent was acting fraudulently or in bad faith but he has to prove that either the transferee or the purchaser gave no value or consideration for the transfer and if there is consideration for the transfer, then the receiver has to prove that there was no good faith on the part of the transferee. *Bilu Bhai v. Kalianji*, A. I. R. Bom. 449.

Page 482. Good faith is necessary only on the part of the transferee. *Rama Nanda v. Pankaj Kumar*, A. I. R. 1938 Cal. 417.

Absence of good faith on the part of the transferee only is relevant. Such burden is not discharged by vague allegations of fraud. *Kullappa v. Veerappa*, A. I. R. 1938 Mad. 285.

Page 482. In an action to set aside a sale under section 53, it is not enough to pick out a few circumstances and to find explanations for them and then deduce therefrom that the creditor had discharged his burden of proof. It is necessary that the court should consider all the facts in relation to each other and weigh them as a whole and come to the conclusion. *Kandaswami v. Rangaswamy*, A. I. R. 1938 Mad. 370.

Addenda.

Page 497. A transfer more than two years old can be set aside under section 4 and not under section 53. The court can deal with the question on the same principles which should govern such a transfer under the ordinary law. *Basharat Ali Khan v. Ram Rattan*, A. I. R. 1938 Lah. 73.

Page 498. Where a transfer by the insolvent is not *bona fide*, the subsequent transfers by the transferees, which are closely linked with the first transfer also fall. *Kanda Swamy v. Ranga Swamy*, A. I. R. 1938 Mad. 370, relying on A. I. R. 1933 Mad. 271.

Section 54.

Page 515. Where a person makes a transfer to one of the creditors who is related to him and at the time of the transfer the transferer is unable to pay his debts as they become due from his own money and there is no evidence that any threat of any criminal proceedings or any coercive action was taken or threatened by the transferee creditor, the transfer in these circumstances amounts to fraudulent preference. *Bhawani Das v. Jeth Singh*, A. I. R. 1938 Sind 82.

Page 515. To determine whether a particular transfer amounts to a fraudulent preference, the test is what is the dominant operative motive of the debtor in making the transfer. A person was appointed the guardian of his son-in-law under the Guardians and Wards Act. The guardian committed a breach of trust and misappropriated his ward's fund. The guardian offered to convey his immovable property to the ward in order to get himself released from this obligation and executed a sale-deed in favour of the ward. The guardian was subsequently adjudged an insolvent. It was held that the sale deed did not amount to a fraudulent preference. *Buchayya Gari Ranga Reddy v. Official Receiver, Anandpore*, A. I. R. 1938 Mad. 177.

Section 56.

Page 530. In the absence of any special circumstances, it is objectionable to appoint a pleader who represents a party in the proceedings a receiver by allowing him to throw up his brief in the middle of the case. *Laxman Prasad v. Govind Prasad*, A. I. R. 1938 Nag. 230.

Page 533. The proceedings following an order of adjudication are not invalidated simply because the order of adjudication is set aside on appeal. A receiver appointed under section 56 by the Court on adjudication is entitled to be paid for the work done by him although the adjudication order be subsequently set aside. Where an order under section 56 appointing a receiver only fixes the rate at which remuneration is to be paid but does not specify the source from which the remuneration is to be received or the particular time for payment, such an order must be considered in the light of section 56 (1) (b), read with the rules framed under section 79 (2) (a) and mentioned on page 52 of the Judicial Commissioner's Circular No. 16, Part II, and the money is to be paid out of the assets of the estate and is not payable until there has been either realisation or distribution. If the realisation or distribution of the assets cannot take place on account of the order of adjudication having been set aside in appeal and the order as it stands becomes inexecutable, a *quantum meruit* is all that the receiver can claim. Ordinarily he is entitled to 5 per cent. of the assets realised and the money is payable out of the estate of the debtor. *Laxman Prasad v. Govind Prasad*, A. I. R. 1938 Nag. 230.

Addenda.

Page 534. The Court has no power under section 56, summarily to direct the third person to deliver up possession of property of which he is in possession if he sets up a title, however flimsy, to it. The only powers the Court has in such circumstances is to try the matter by appropriate proceedings under section 4. *Jasodabai v. Firm Shri Kishen Radha Kishen*, A. I. R. 1939 Nag. 10.

Section 59.

Page 544. The existence of a contract to mortgage entered into more than three months before an insolvency petition would be no bar to the official receiver selling the property, although it might furnish a cause of action in a suit for specific performance. The existence of such a contract does not constitute a danger which the official receiver is bound to forestall by an application under section 54, P. I. A. *Venkadari Somappa v. Official Receiver, Bellary*, A. I. R. 1938 Mad. 801.

Page 544. Where the sale deed executed by the official receiver of an insolvent father's estate and the evidence of the purchaser showed that what was intended to be sold and purchased was the entire property for a consideration which represented the value of the whole property and not merely the insolvent's own half share after excluding the son's half share, and the official receiver had power on that day to sell the son's share also, it was held that it must be deemed that the sale was of the entire property. *Gudivada v. Potti Swami*, A. I. R. 1938 Mad. 299.

Page 548. Where the Insolvency Court vests the estate of an insolvent in the official receiver and later on appoints two other persons as additional receivers to administer the estate, without vacating the order vesting the estate of the official receiver and making another order vesting the estate in a body of three receivers, the official receiver can by himself maintain suits to recover the estate of the insolvent. *Basheshir Nath v. Baij Nath*, A. I. R. 1938 Lah. 264.

Section 61.

Page 574. The expression "a debt due to the Crown or any local authority" includes not only a debt which has become due to the Crown but also a debt which is provable within the meaning of section 46 (3), P-t. I. A., whether such demand has become provable or not and whether it is in point of law strictly a debt or not. *Secretary of State v. Official Assignee*, A. I. R. 1938 Sind 49.

Section 66.

Page 597. The wife and children of an insolvent have no legal right under the general law for any provision being made for their maintenance out of the immovable property of the insolvent. Section 66 (2) is not meant for reserving the immovable property of the insolvent for the residence and maintenance of his wife and children. It is meant only for the purpose of reserving a money allowance for them. *Firm Labhumal Banarsi Dass v. Mst. Bibi*, A. I. R. 1939 Lah 39.

Section 68.

Page 604. A sale held by the receiver under instructions of the Court is not an act of the receiver and section 68 does not apply. An application to set it aside is within time although it may be presented twenty-one days after sale. *Deosthan Narsingji v. Bhae*, A. I. R. 1938 Nag. 320.

Addenda.

Page 604. The official assignee is the person in whom the insolvent's property vests as owner though only for the benefit of others. Therefore a claim that a certain property has not vested in him at all or a claim to have a charge upon property which is vested in him cannot under the Act be dealt with by him as a tribunal. The official assignee in such a matter is a party litigant. Even if the matter should be regarded as a mere question of admitting or rejecting a proof, when the official assignee acts under rule 25, schedule 2, it seems more reasonable and more in accordance with a sound interpretation of section 86 and within the practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the official assignee to the judge should be by motion and that the oral evidence necessary should be taken before the Insolvency Judge himself. *Sooní Ram v. Alada Nachiya Koier*, A. I. R. 1938 Privy Council 259 a case under the Presidency-towns Insolvency Act.

Section 69.

Page 613. A judgment-debtor against whom a decree has been obtained was adjudicated as insolvent and the Insolvency Court which was conducting a summary administration of the insolvent's estate put the flour mill of the insolvent to auction and obtained a bid from the decree-holder for a certain amount which was deposited by the purchaser. The mill was however never delivered to the purchaser. Subsequently the essential parts of the machinery were removed by the insolvent. The insolvent's conviction under section 69 (c) (II), P. I. A., 1920, was upheld on the ground that the contract, between the court and the purchaser being a private one and the Court being liable to deliver the machinery according to the contract, the insolvent was not entitled to remove any part, and that his conduct was such that from it an intention to cause wrongful loss to the creditors could be inferred. *Ganesh v. Emperor*, A. I. R. 1939 All. 166.

Page 613. No appeal lies against an order of the District Judge, sitting in insolvency, passed under section 70, making a complaint, after a preliminary inquiry, to a Magistrate to be dealt with by him under section 69. If there is any appeal against such an order it can only be under section 75 (3) and only by leave of either the District Court or the High Court. But a very strong case will be needed to justify the granting of such leave. Where such leave has not been obtained, the appeal is incompetent, nor does an appeal lie under provisions of section 476 (b), Cr. P. C. *Madan Mohan v. Emperor*, A. I. R. 1939 Cal. 264.

Section 75.

Page 636. The words "any such person" in sub-section (2) of section 75 include those persons in sub-section (1) of section 75. Right of appeal under section 75 is not limited only to those persons, who have *locus standi* under section 50, for it would give a debtor a right of appeal only in cases where the matter came before a Court subordinate to a District Court, but would give him no right of appeal if the matter in the first instance came before the District Court, which could not be intended by the legislature. Thus from an order of the Court declaring the debt to have been proved, an appeal by the debtor lies to the High Court. *Makhanlal v. Bhagwansingh*, A. I. R. 1938 Patna 471,

Addenda.

Page 638. In the matter of an application under section 53 of the Act a creditor aggrieved by an order of a district Court may appeal to the High Court without first applying to the official receiver to appeal and getting refusal from him. *Kandaswamy v. Rangaswamy*, A. I. R. 1938 Mad. 370.

Page 640. A third person whose title to property is affected by an order of adjudication is a person aggrieved by it and is entitled to appeal from it. But he cannot succeed in appeal merely on the ground of the absence of the notice of adjudication to him by the Insolvency Court. *Bhawani Das v. Jeth Singh*, A. I. R. 1938 Sind 82.

Page 645. In revision the High Court has got wider powers than it has under section 115, C. P. C. *Kamla Bai v. Chitra Parsad*. A. I. R. 1938 All. 57. Where there was no real consideration of evidence and the court's consideration of the case was superficial, the interference in revision was held necessary. *Kissen Gopal v. Umrao*, A. I. R. 1938 Nag. 216.

Page 647. No appeal lies from the District Court to the High Court on the ground that the rate of interest allowed in the scheme by the official receiver was higher than permissible under the provisions of the Act. The reason is that the matter does not fall under section 4. *Dudh Sen v. Ashrafi Lal*, A. I. R. 1938 All 28.

Page 651. Admission of appeal is tantamount to grant of leave under section 75 (3). Absence of leave is no bar provided there is a substantial question for consideration. *Sagarmal v. Abdul Rahman*, A. I. R. 1938 Oudh 101.

Page 651. A creditor on behalf of himself and other creditors made an application to the District Judge under section 151, C. P. Code read with section 5, P. I. A., praying that the order annulling the adjudication passed by his predecessor should be modified by vesting the insolvent's estate under section 37 in the official receiver till the debts due to the unpaid creditors were paid under the insolvency law. The District Judge refused to modify the order. It was held that the order of the District Judge was appealable with leave of the District Judge or of the High Court. *Rama Krishna v. Official Receiver*, A. I. R. 1938 Mad. 461.

Section 78.

Page 669. The period to be excluded under this section runs from the order of adjudication and not from the date of the insolvency petition by virtue of the doctrine of relation back, *Nagarur Sumbayya v. Nagarur Pedda Subbayya*, A. I. R. 1938 Mad. 19.

Page 667. Inclusion of debt by the insolvent in his schedule filed with the petition does not make it proved. *Vela Galey v. Kandeçu*, A. I. R. 1938 Mad. 143.

THE PROVINCIAL INSOLVENCY ACT

ACT V OF 1920

(AS MODIFIED UPTO DATE)

Passed by the Indian Legislative Council.

Received the assent of the Governor-General on the 25th February, 1920.

An Act to consolidate and amend the Law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Town of Karachi (1).

WHEREAS it is expedient to consolidate and amend the law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the *Town of Karachi* (2); It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Provincial Insolvency Act, 1920.

(2) It extends to the whole of British India, except the Scheduled Districts.

Bankruptcy Law ; Its origin and history.—In the indigenous system of law there is no provision similar to that found in the modern Bankruptcy Acts. Even in the days of the later Smritis, when the Hindu Law had attained considerable perfection in other respects, we find no indication of anything approaching a system of bankruptcy. Of course there were means, like the arrest of the person of the debtor's son or the employment of force or friendly persuasion by which the creditor could realise his debt from the debtor. Beyond this there was nothing which provided for the seizure of the debtor's property for the benefit of his creditors and its rateable distribution amongst them.

The Roman Law treated the debtors in a most barbarous way. The creditor could take steps for the realisation of his debt against the debtor's person only. He could not proceed against his property. It was at a later period that this was permitted and that too only under certain conditions and in certain specified cases. In about 48 B. C. another form of procedure commonly known as *Cessio Bonorum* was introduced. It enabled a debtor to become a bankrupt on his own petition by surrendering the whole of his property to his creditors. And, in return, he was relieved from all liability for arrest and imprisonment. But his after-acquired

(1) "Karachi" was substituted for "Rangoon" by the Government of India (Adaptation of Indian Laws) Order, 1937.

(2) These words were substituted by section 11 of the Insolvency Amendment Act, IX of 1926, and subsequently amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

S. 1. property remained liable for the payment of his debts except that he was allowed out of such property a certain portion for his subsistence.

In striking contrast to the Roman Law, the Common Law of England did not know of any process whereby a person could pledge his person for payment of a debt. The necessity, however, soon arose, and the writ of *capias* and *respondendum* was employed for the arrest and imprisonment of the debtor. This mode of execution came in course of time to be so largely resorted to by creditors that the legislature had to intervene to prevent its abuse. There were two sets of legislation, one directed against the tyranny of creditors and the hardships of the jail, and the other directed against dishonest and fraudulent debtors. The laws against fraudulent debtors were, what were called in those days, the Bankrupt Laws. These laws were, however, an innovation on the Common Law. They were entirely a creature of statute. The first English Act was passed in the year 1542, being the statute 34 and 35 Hen. 8, c.4. The Law of England successively progressed by slow degrees from the old idea of treating the debtor as a criminal and delinquent to a more humane treatment of him until it became a code of equity and justice. It is unnecessary to trace the history of English Law from its very beginning till to-day. Suffice it to say that the most important bankruptcy statutes were those passed in the years 1849, 1969, 1883 and 1914. Bankruptcy under English Law is even now considered to involve a change of status, and to carry with it certain grave disqualifications.

"Bankruptcy": its meaning and origin.—Various derivations have been given of the word "bankrupt." According to some it is derived from the Latin words "*Bancus*," a table or counter of a tradesman, and "*Ruptus*," broken, in allusion to the custom said to have prevailed in Italian cities during the Middle Ages of breaking the table of a defaulting tradesman. According to others it is derived from the French word "*Banque*," "*Counter*" and "*Route*," a track, signifying that the tradesman has removed his table or counter leaving but a trace behind. It is also to be observed that both the origins indicate the fundamental attribute of a bankrupt to be his inability to pay his debts. The earlier bankruptcy law was a species of criminal law and bankrupts under that law were regarded as criminal offenders. The treatment to which they were subjected was cruel and inhuman. Under the Roman Law, if the debtor did not pay within a specified time, the creditors were at liberty to cut the debtor's body into pieces, each of them taking proportionate share; and no creditor who cut too little or too much could be called to account therefor. Under the Common Law the debtor was left in jail either to starve and die or depend on the charity of his friends. It were these barbarities which made the conscience of humanity revolt against these shameful practices. It was soon recognised that a person's inability to pay his debts may not necessarily arise, and does not in fact arise in most cases, from fraud or dishonesty, but from causes like misfortune, losses in trade and the like which are beyond the control of any person. Thus the necessity for this humane treatment of the debtor was at first felt in the case of traders only and the early English Acts were confined to them only. Later on, however, it came to be felt that even in the case of a non-trader circumstances may arise, which may entitle him to the relief given by the law of bankruptcy. The result was that in later statutes the distinction between traders and non-traders as regards liability to be made bankrupt was abolished, although certain inci-

dents of Bankruptcy Law still apply only to persons who carry on a trade or business (1). §. 1.

Bankruptcy Law : Its objects and policy.—Under the preceding heading we have traced the history of Bankruptcy Law from its origin to its modern state. The chief aim of every system of bankrupt law in modern days is to combine and regulate two great objects :—(1) The distribution of the effects of the debtor in the most expeditious, the most equal, and the most economical mode ; and secondly, the liberation of his person from the demands of his creditors when he has made a full surrender of his property (2). On the one hand it protects the interests of the creditors by compelling the bankrupt to give up all his effects for distribution amongst them without any fraudulent concealment (3) ; on the other hand, it exempts the debtor from being arrested by an individual creditor in pursuing his ordinary remedy for the realisation of his debts. It also safeguards the rights of the creditors *inter se* by providing that no one creditor is to take an undue advantage over the other (4). The Bankruptcy Laws are also calculated for the benefit of trade. For the promotion of commercial interests it is necessary that a dishonest trader should be punished and made to pay for his dishonesty and also that an honest trader, who has suffered losses in trade on account of sudden and unavoidable accidents should get back his liberty to start a new life without being handicapped by his liability to account for losses for which he is not to blame. In order to secure the first object the statutes provide for the investigation of the insolvent's conduct in the course of insolvency proceedings and for his punishment by making certain fraudulent and dishonest acts on his part criminal offences. In order to secure the second object provision has been made for giving the debtor his discharge which has the effect of freeing him from nearly all his past liabilities, thereby enabling him to start his life anew.

Insolvency Law in Presidency-towns.—The first insolvency courts in the Presidency-towns of Calcutta, Madras and Bombay were established by the statute 9 Goe. 4, c. 73, passed in the year 1828. The courts were called " Courts for the Relief of Insolvent Debtors." This Act continued in force till 1848, though in the interval certain amendments to it were made. In 1848 the previous enactments were repealed and an Act was passed called the Indian Insolvency Act, being 11 and 12 Vict. c. 21. The Act reserved the distinction between traders and non-traders in certain respects. The court established by the Act of 1828 was continued but the court was to be held before a Supreme Court. In 1861 the Supreme Courts were abolished and High Courts established, in their place, by Indian High Courts Act, 1861, being 24 and 25 Vict. c. 104. The High Courts were given to exercise such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India in any place whether within or without the Presidency (5). The amended Letters Patent of 1865 limited these powers to places within the Presidency only. Then came the Presidency-towns Insolvency Act, 1909. This Act was a

1. Section 28, clause 3 ; St : 42 Cl. 1 B. & C.

2. Henley's Bankrupt Law, 3rd Edition page 1.

3. Mahbir Prasad v. Shivanandan Sahay, A. I. R. 1934 Pat. 514 : 152 I. C. 277 (the object of the Insolvency Act is to make all the property of the insolvent divisible amongst all his creditors).

4. Ramanathan Chettiar v. Subramania Chettiar, 48 M. 656 : A. I. R. 1915 Mad 248 : 85 I. C. 216 ; In the matter of V. Parushothamdas, 55 M. L. J. 657,

5. S. 11, Indian High Courts Act, 1861.

- S. 1. considerable improvement upon its predecessor. Till to day it is this Act, with slight modifications made by subsequent legislation, that is in force in the Presidency-towns. The only important amendment has been to extend the operation of this Act to the towns of Karachi and Rangoon.

Insolvency Law in the Mofussil.—The Code of Civil Procedure, 1859, according to Doctor Whitley Stokes (1), contained "a germ but only the germ of an insolvent law." In 1877 some fifteen rules were framed and incorporated in Chapter 20 of the new Code of that year and power was given to District Courts to entertain insolvency petitions and to make an order of discharge. Those rules were contained in sections 344 to 360 of the Code of Civil Procedure, 1882. In 1907 the first Provincial Insolvency Act was passed containing about 50 sections. The Act contained a simple but fairly complete procedure in insolvency adapted to the districts. Prior to 1907, for the Punjab there was a special but incomplete law contained in eleven sections of the Punjab Law Acts, Act IV of 1872. It, like that contained in the Code of Civil Procedure, was, however, too limited in scope, and it neither afforded adequate relief to honest debtors nor sufficiently secured the rights of creditors.

The Act of 1907 was, in actual practice, found defective in many respects (2). At the time of passing the new Act in 1920 many important changes were made. Some of them are noted below :—

(1) Under the old Act of 1907 a debtor could claim adjudication almost as a matter of right, but under the new Act he must also show that he is unable to pay his debts although only *prima facie* evidence for that purpose would suffice (3).

(2) The new Act gives the Court greater powers of control over the person and property of a debtor (4).

(3) The penal provisions of the new Act are wider and more stringent than they were under the former Act (5). The new Act provides for better protection of the property of the debtor against the attacks of individual creditors. Consequently it is more beneficial for the general body of creditors (6).

(4) Section 4 of the new Act confers very wide powers on the insolvency court to decide questions of title thereby expediting the insolvency proceedings which were under the old Act likely to be protracted by bringing suits in ordinary courts of law.

(5) The right to appeal under the new Act is also extended by allowing a second appeal to the High Court in certain cases (7).

(6) Under the old Act it was optional for the insolvent to apply for discharge, and in most cases it stood to his advantage not to apply for it.

1. Anglo-Indian Code, Vol 2, p. 418.

2. See Letter No. 658--670 dated 23rd March, 1914, from the Government of India (Home Deptt.) to the Local Governments on the working of the old Provincial Insolvency Act of 1907.

3. S. 10 and S. 24, Cl (a) proviso of the new Act.

4. Ss. 22, 27, 23, 32, 38, 43 and 71 of the Act of 1920. Also compare proviso to S. 13 (2) of Act of 1907 with St. 20 of the present Act.

5. Compare S. 43 of the old with S. 69 of the new Act.

6. Compare S. 34 of the old with S. 51 of the new Act.

7. Compare S. 46 of the old with S. 75, Cl. (1), 2nd proviso of the new Act,

Section 22 of the present Act now makes it obligatory for the insolvent to apply for discharge within the period fixed by the court. If he fails to so apply, the court can annul the adjudication. S. 1.

(7) Under the old Act a proposal for composition or scheme of arrangement could be entertained either before or after adjudication. Under the new Act it can be done only after the order of adjudication (1).

(8) Section 16, clause 2 (b) entitled the debtor to be released from prison as soon as an order of adjudication was passed. Under the new Act section 31 gives the court the power to withhold or cancel protection orders at its discretion.

(9) Under the new Act an order of discharge under section 44, clause 2, releases the insolvent from all provable debts, whereas under the old Act he was released by such an order from debts entered in the schedule only.

(10) The present Act contains provisions which facilitate the prosecution of fraudulent debtors (2).

Amendments of the Act, V of 1920.—The Provincial Insolvency Act, V of 1920, has subsequently been amended by the following Acts :—

(1) The Insolvency (Amendment) Act, IX of 1926, which received the assent of the Governor-General on the 26th February, 1926. This extended the operation of the Presidency Act to the Town of Karachi.

(2) The Sind Courts (Supplementary) Act, XXXIV of 1926, which received the assent of the Governor-General on the 9th September, 1926.

(3) The Provincial Insolvency (Amendment) Act, XXXIX of 1926, which received the assent of the Governor-General on the 9th September, 1926.

(4) The Repealing and Amending Act, X of 1927, which received the assent of the Governor-General on the 4th April, 1927.

(5) The Insolvency (Amendment) Act, XI of 1927, which received the assent of the Governor-General on the 2nd September, 1927.

(6) The Repealing Act, XII of 1927, which received the assent of the Governor-General on the 8th September, 1927.

(7) The Repealing and Amending Act, XVIII of 1928 which received the assent of the Governor-General on the 25th September, 1928

(8) The Repealing and Amending Act, VIII of 1930, which received the assent of the Governor-General on the 16th March, 1930.

(9) The Provincial Insolvency (Amendment) Act, 1935, Act No. X of 1935, which received the assent of the Governor-General on the 28th September, 1935.

(10) The Government of India (Adaptation of Indian Laws) Order, 1937.

Date of Operation of the Act.—The Act is silent as to the date from which it is to come into operation. It, however, came into force on the 25th February, 1920, the date on which it received the assent of the Governor-General (3).

1. Compare S. 27 of the old with S. 38 of the new Act.

2. Ss. 69 and 70 of the new Act.

3. *Vide* General Clauses Act, X of 1897, S. 5.

- S. 1. Towns of Rangoon and Karachi.**—By section 11 of the Insolvency (Amendment) Act, IX of 1926, the words “towns of Rangoon and Karachi,” in the preamble were substituted for the word “Towns of Rangoon.” Now cases arising within the original civil jurisdiction of the Court of the Judicial Commissioner of Sind are governed by the Presidency-towns Insolvency Act, 1909. The reference to Rangoon has now been deleted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Scheduled Districts.—“Scheduled Districts” mean the territories mentioned in the First Schedule of the Scheduled Districts Act, XIV of 1874. The Provincial Insolvency Act has been extended by notification under section 5 of that Act to:—

The Province of Sind.—See *Gazette of India*, 1920, Part I, page 2052 and *Bombay Government Gazette*, 1920, Part I, page 2765.

Coorg.—See *Gazette of India*, 1920, Part I, page 1333.

Upper Burma.—See *Burma Gazette*, 1920, Part I, page 1303.

District of Cachar (excluding the North Cachar Hills), Sylhet, Goalpara, Kamrup, Darrang, Nowgong (excluding the Nowgong Mikir Hills Tract), Sibsagar (excluding Sibsagar Mikir Hills Tract) and Lakshmi-pur (excluding the Lakshmi-pur Frontier Tract). See *Assam Gazette*, 1920, Part II, p. 2511.

District of Darjeeling.—See *Calcutta Gazette*, 1921, Part I, page 288.

British Baluchistan.—See Baluchistan Local Rules and Orders, Part II, page 244.

Pargana of Manpur.—See section 21 and Schedule of the Manpur Laws Regulation, 1926 and Panth Piploda, see Regulation 1 of 1929, section 2.

All the Scheduled Districts in the N.-W. F. Province.—See Notification No. 2286-G., dated 28th May, 1920, *Gazette of India*, 1920, Part II, page 910.

British India.—“British India shall mean all territories and places within His Majesty’s Dominion which are, for the time being, governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India (1).”

Construction of Bankruptcy Acts.—The Bankruptcy Acts are in the nature of penal enactments and therefore if it is capable of two constructions, that one should be adopted which is most favourable to the person affected (2). It is a rule of construction, applicable to Bankruptcy Statutes generally, that as between two possible constructions of which one will do great unnecessary injustice, while the other will avoid and keep exactly within the purpose for which the statutes were passed, the court is bound to adopt the latter (3). Practice is a useful guide where statute uses a language of doubtful import, but a practice which is in contravention of the law, even though such practice be of the High Court,

1. General Clauses Act, X of 1897, S. 3, Cl. (7).

2. 1895, 2 Q. B. at page 271; 1839, 22 Q. B. at page 278.

3. 1884, 9 A. C. at page 455; 1830, 15 A. C. 363; 1892 A. C. at page 623.

cannot make lawful that which is unlawful (1). In the case last cited it was held that the practice of the Bombay High Court requiring an insolvent whose discharge has been suspended to appear and obtain a final and absolute discharge after the expiry of the period of suspension is contrary to law.

S. 1.

Relevancy of English Decisions.—In more than one case (2) their Lordships of the Privy Council have deprecated the practice of referring to English decisions for the purpose of interpreting an Indian Act. In *Rama Nandi Quer v. Kalavati Quer* (3), a recent case, their Lordships of the Privy Council observed, "It has been often pointed out by the Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English Law upon which it may be founded."

It has, however, not been found practicable even by the Privy Council and the Indian High Courts not to refer to English cases as guides for interpreting Indian Acts (4). For instance where an Indian Act is professedly based on an English enactment the Indian Courts are in practice, if not in theory, bound by the decisions of the English Court of Appeal (5). The correct rule of interpretation in such cases has been laid down by a Division Bench of the Madras High Court in *Penunetsa China Venkataraju v. Pulavarthi Lakshmanaswami* (6), in the following words, "It cannot be questioned that the Indian Legislature has been borrowing from the English Bankruptcy Act in enacting the Insolvency Acts in this country. No doubt Courts in India are bound, in the first instance, to construe the words of the Indian Act, whenever any question arises, and in case of difference between the wordings of the Indian Act and the English Statute, Courts in India are bound to give effect to the words of the Indian Act, and confine themselves to the Law as enacted by the words occurring in the Indian Act. Where, however, the language of the Indian Act and the English Statute is identical, I think Indian Courts are entitled to seek guidance and help from the decisions of English Courts in such matters" (7). In the case last cited the learned Judges relied upon English decisions for the purpose of construing sections 34, 48, 61 and 67 of the present Act. The Indian Courts have referred

1. *Murad Ally Shamjee v. B. N. Rang*, A. I. R. 1920 Bombay 419 : 53 I. C. 627 (630) Also see *Woon Wala and Co v. Macleod*, (1906) 44 B. 555 : 30 Bom. 515 : 8 Bom. L. R. 470, on appeal from (1905) 7 Bom. L. R. 954 (958). (Sale by official assignee, with sanction of court—no power of court under section 31 to set aside completed sale).

2. See A. I. R. 1918 P. C. 11 : 47 I. C. 513 ; *Imam Gandhi v. Mutsaddi*, 45 I. A. 73 : 45 Calcutta 878 ; *Rama Nandi Quer v. Kalavati Quer*, 55 I. A. 18 : 7 Patna 221 : A. I. R. 1928. P. C. 2 : 107 I. C. 14 ; *Sharfuzzaman v. Hunter*, A. I. R. 1930 Oudh 20 : 121 I. C. 903.

3. 55 I. A. 18 *supra*.

4. *Premasuk Das Asram v. Udai Ram Gunga Bux*, A. I. R. 1918 Cal. 467 : 44 I. C. 233 : 45 Cal. 138.

5. *Firm of Gianchand Dilaram*, In the matter of, 131 I. C. 705 : A. I. R. 1931 Sind 70 ; *Dhamajmal Kishin Dass v. Official Assignee*, 131 I. C. 130 : A. I. R. 1931 Sind 44 (both cases under Pr. T. I. Act).

6. A. I. R. 1931 Mad 729 : 134 I. C. 169.

7. *Official Assignee (Mad.) v. Trustees of Port Trust*, A. I. R. 1936 Mad. 789 : 166 I. C. 427 (case under the Presidency-towns Insolvency Act. 1909).

- S. 1. to and relied upon English decisions in many cases (1), on the ground that the Insolvency Act is in many instances taken word for word from an English Act, and English decisions, though not actually binding on Indian Courts are entitled to the greatest respect. However, in 32 I. C. 795 (Madras) the High Court refused to follow a decision of the House of Lords on the question of Bankruptcy Law. And in *Hari Das v. Lalu Bhai* (2), the court interpreted a section of the present Act as it stands without reference to the Companion Acts.

Retrospective operation of the Act—The general rule of construction of Statutes is that enactments in a Statute are to be construed to be prospective, not retrospective in their operation (3). The principles are well established that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation (4). But, ordinarily, changes of law relating to Procedure have retrospective effect, and must apply to all proceedings or actions commenced before or after the passing of the Act (5). As remarked by Pollock C. B. in the leading case of *Wright v. Hale*, "there is a considerable difference between new enactments which affect vested rights, and those which affect the procedure in Courts of Justice" (6). "When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, it does apply to such actions" (6). The rule is thus laid down by their Lordships of the Privy Council, "that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" (7). No one has a vested right in any particular form of procedure (8); and where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions commenced before or after the passing of the Act (9). But when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away (9). The legislature no doubt possesses the power to divest existing rights, but it is to be presumed that it is generally unwilling to do so; and consequently, unless an intention to the contrary is clear, an Act dealing

1. See 1913, 39 Mad. 250; *Nagindas Bhukandas v. Ghelabhai Gulabdas*, A. I. R. 1920 Bom. 58 (2); 44 Bom. 673 56 I. C. 450; 1911, 34 All. 106; (*Chaudhri*) *Sharfuzzaman v. Deputy Commissioner, Barabanki* A. I. R. 1925 Oudh 28; 79 I. C. 858; *Premasukdas v. Udairam Gunga Bux*, A. I. R. 1918 Cal. 467; 44 I. C. 233; 45 Cal. 138; *Nandlal Mukerjee v. Girdharilal*, 109 I. C. 633; A. I. R. 1928 Oudh 263; 3 Luck 588; *Lakhiprasad v. Ugrannusra*, 13 Pat. 78; 148 I. C. 39; A. I. R. 1933 Pat. 461.

2. 55 Bom. 110; 129 I. C. 153; A. I. R. 1931 Bom. 50.

3. *Javanmal Jitmal v. Muktabai*, 14 Bom. 516 (525).

4. *Jiban Krishna v. Abdul Kadar*, A. I. R. 1933 Cal. 435 (437) S. B. : 143 I. C. 164.

5. *Balkrishna Pandarinath v. Bapu Yesaji*, 19 Bom. 204.

6. *Wright v. Hale*, 39 L. J. Ex. 40; 6 H. & N. 227.

7. *Delhi Cloth and General Mills Co. v. Income Tax Commissioner*, 106 I. C. 156 (158) P. C. : 1927 P. C. 242; 56 I. A. 421; 9 Lah. 284 and *Colonial Sugar Refining Co. v. Irving*, 1905 A. C. 369 P. C.

8. *Republic of Costa Rica v. Erlanger* (1876) 3 Ch. D. 62; *Warner v. Murdick* (1877) 4 Ch. D. 750.

9. *Wright v. Hale* 39 L. J. Ex. 40; 6 H. & N. 227; also see *Kimberley v. Draper* (1868) L. R. 3 Q. B. 163.

with rights of action is to be construed as prospective merely. (1) The provisions of the new Insolvency Act have no retrospective effect (2). Thus it was held that the right of an insolvent adjudicated as such under Act III of 1907 to have execution proceedings against him stayed, unless the Insolvency Court gives leave to prosecute them, is a substantive right, and is not abrogated by Act V of 1920, and so an order for his arrest without leave of the Insolvency Court was without jurisdiction (3). But the discretion given to the Court by the Legislature steadily in respect of applications under the new Act cannot again be extended to applications made under the old Act of 1907, which could be made only under that Act on its date (4). Similarly, where a debtor filed his insolvency petition under the old Act and secured an order of adjudication in his favour, the order conferred certain rights upon him which could not be divested by the new Act; and the creditors, consequently could not obtain the order of adjudication annulled under the new Act, nor could they claim any exemption under section 78 (2). (5). In a case where the original insolvency petition presented by a creditor under section 6 (4) (c) to the District Munsiff was without jurisdiction, and being returned for presentation to the District Court, more than three months had elapsed since the commission of the act of insolvency upon which the petition was grounded, it was held that the petition was liable to be rejected as out of order. (6). In another case where the application for insolvency presented under the old Act had complied with the requirement of section 6 (3) of that Act, it could not be dismissed by applying the provisions of the new Act. (7). However, all proceedings on a petition filed under Act III of 1907 need not be dealt with under the provisions of the old Act; and it is recognised that by merely filing a petition under the old Act, the petitioner did not acquire a vested right to a particular kind of order which could not be affected by the new Act; accordingly, where an insolvency petition was presented under the old Act, but the petitioner was adjudicated an insolvent after the new Act had come into force, the nature of the order to be passed was held to be a matter of mere procedure and the condition imposed by the Court that the discharge must be applied within one year, was valid under the provisions of new Act. (8). In a Punjab Case where a firm was declared insolvent under the old Act, (Punjab Laws Act, 1872) but a sale was held in insolvency proceedings after the new Act III of 1907 had come into

1. *Hindus Singh v. Mangal*, A. I. R. 1923 Nag. 227 : 72 I. C. 438; *Pars Ram v. Emperor* A.I.R. 1931 Lah. 145 (151, 152) : 131 I. C. 353.

2. *Gurmukhdas Rangalmal v. Hassomal*, A.I.R. 1932 Sind 71 : 139 I. C. 589 : Also see *Mohiruddin v. Garanath*, A. I. R. 1928 Cal. 221.

(3) *Solarappa Naickar v. Shunmugam Sundaram Pillai*, A. I. R. 1926 Mad. 510 : 93 I. C. 3. (Folid. *Natesa Chettiar v. Annawalai*, A. I. R. 1923 Mad. 487 : 73 I. C. 213 and *Rangiah Chettiar v. Auraswami*, A. I. R. 1924 Mad. 368 : 79 I. C. 408.

(4) *Pulpati Hanwara v. Ravapati Ramayya*, A.I.R. 1921 Mad. 272 (1) : 64 I.C. 270.

(5) *Gurmukhdas Rangomal v. Hassomal Tharumal*, A.I.R. 1932 Sind 71 : 139 I. C. 589 : 26 S. L.R. 204.

(6) *Aiyaparaju v. Venkatakrishtayya*, A. I. R. 1923 Mad. 462 : 72 I. C. 488.

(7) *Mohiruddin Molla v. Gayannath Poddar*, A. I. R. 1918 Cal. 221, *cf.* *Rangiah Chettiar v. Aunaswami*, A. I. R. 1924 Mad. 368 : 79 I. C. 408.

(8) *Kallukut Parambath v. P. Puten Pectikakkal*, A. I. R. 1926 Mad. 123 : 91 I. C. 144.

- S. 1. force, it was held that the provision of section 46 of the Act of 1907 gave a right of appeal on the ground that it was a mere matter of procedure. (1) Similarly, it has been held by the Lahore High Court that where a claim to property in insolvency proceedings was decided under the new Act V of 1920, even though the order of adjudication was passed under the old Act, the decision was final because the claim is to be determined according to the procedure prescribed by the new Act. (2)

Foreign Court—The term "Foreign Court" is not defined in this Act. The definition given in the Civil Procedure Code is not applicable to cases arising under the Act (3). The District Court of Secunderabad, though not a Foreign Court under the Civil Procedure Code, is one under the Act (4).

Operation of Act Beyond British India.—The Provincial Bill of 1906 contained the following clause: "This Act applies also to:—(a) all Native Indian subjects of His Majesty in any place without and beyond British India, (b) all other British subjects within the territories of any Native Prince or Chief in India and (c) all servants of His Majesty, whether British subjects or not, within the territories of any Native Prince or Chief in India." And in the Objects and Reasons it was stated, "It is proposed not only to make the law extend territorially, like the Civil Procedure Code, to the whole of British India except the Scheduled Districts, but also to give it the widest extra-territorial application possible in the case of an Act of the Indian legislature." But this provision has not been incorporated in the Act, the Select Committee stating "That portion of the Bill which proposed to extend its operation to certain persons residing outside British India has been struck out as unnecessary."

Rules of Private International Law on Bankruptcy.—Sometimes questions as to the extra-territorial effect of an order in bankruptcy in India and the effect of a similar order passed by a Foreign Court in India arise. These questions are to be decided by rules laid down by the Comity of Nations.

In Section 167 of the English Bankruptcy Act, 1914, the definition of "property" includes every description of property whether situate in England or elsewhere; and in Section 38 the property of the bankrupt divisible amongst his creditors comprises all such property as may belong to or be vested in the bankrupt. By Section 17 of the Presidency-towns Insolvency Act, 1909, it is provided that on the making of an order of adjudication the property of the insolvent, wherever situate, shall vest in the official assignee. In the Provincial Insolvency Act, Section 2 clause (b) defines the word "property" but it does not in terms include property wherever situate. Section 28 of the Act provides that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court. It appears that the legislature

(1) *Chunnilal v. Beharilal*, A. I. R. 1916 Lah. 360: 33 I. C. 995.

(2) *Shiv Narain v. Lachmi Narain*, A. I. R. 1929 Lah. 761: 119 I. C. 733.

(3) *Akarappu Venkanna v. Akarappu Chennaya*, A. I. R. 1929 Mad. 900: 123 I. C. 20.

(4) *Official Receiver of Secunderabad v. Gummi Delli Lakshmi Narayan*, A. I. R. 1931 Mad. 474: 54 Mad. 727: 132 I. C. 297. (On appeal from A. I. R. 1929 Mad. 1900; *Secretary of State v. Charles Worth Filing Co.*, 1901. A. C. 373, Followed).

did not extend the operation of Section 28 or other provisions of the Act to property situate outside British India in express words because in practice it was found unnecessary and ineffective. The principles which determine the vesting of property situate outside British India, belonging to the bankrupt, in the receiver are laid down by private International Law and not by the municipal law of any one country.

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Effect of a foreign adjudication on property situated in British India.—As already stated the legislature of no country is entitled to make laws for territories outside its jurisdiction. Of course there is nothing to prevent the legislature of a country to enact laws purporting to operate outside its own jurisdiction but such laws will be practically of little or no practical effect for the simple reason that they shall not be recognised in the foreign territory. The leading English case on this proposition is *Macleod, v. Attorney General, New South Wales* (1). That was a case in which a man was convicted of bigamy at the Court of quarter sessions at Sydney, New South Wales, the bigamy having been committed in the United States of America. The Privy Council, in reversing the conviction, held that the words "whoever being married" in the Colonial Statute could only be taken as meaning for the purposes of the statute "whoever being married and who is amenable, at the time of the offence committed, to the jurisdiction of the colony of New South Wales." Similarly it was held that the word "wheresoever" should be read as "wheresoever in this colony the offence is committed"; and it was remarked that to give to the words "whosoever" and "wheresoever" an extended extra-colonial application would be to allow to the colony a legislative authority that it did not possess. Such laws do not, therefore, operate outside the jurisdiction of the legislature making these laws *via statuti i.e.*, by force of those laws. It does not, however, mean that the laws of one country cannot operate or cannot be recognised for any purpose in a foreign territory. By the comity of nations there has developed a code of rules which are generally called private international laws; and according to those rules very often effect is given to the legislation of one country in another. Following the above principle it is clear that an adjudication order of a foreign court has no effect of vesting in the receiver property situate in British India except in so far as it is recognised in private international law and *vice versa* (2). In other words, the foreign adjudication order does not operate in British India *via statuti*, but only under the rule of private international law. The leading English case on the matter under consideration is *Galbraith, v. Grimshaw* (3) as regards movable estate, for it is settled that no adjudication order is recognised as having the effect of vesting in the receiver any immovables in another country. As already stated an adjudication order of a foreign court is recognised as vesting the movable estate of an insolvent, if that court is the court of the country governing the person of the owner, everywhere else (4), but it shall so operate only subject to a valid charge existing on that property in the country where the property is situated. The foreign court must take the assets of the bankrupt such as they were at the date of the adjudica-

(1) 1882, 21 : Ch. D 674 : 30 W R. 698.

(2) *Sumer Mull Surana Re*, 136 I.C. 141 : A. I. R. 1932 Cal. 124.

(3) 1910 A. C. 508.

(4) *Official Assignee v. Ghanshamdass Hotechand*, A. I. R. 1934 Sind 44 : 148 I. C. 941.

S. 1. tion and with all the liabilities to which they were then subject. It will not be allowed to interfere with any process at the instance of a creditor already pending on the date of the adjudication, provided that at that date the bankrupt's freedom of disposal was so restricted by the process that he could not have assigned the subject-matter of the process to the receiver. The test in each case will be whether the bankrupt could have assigned to the trustee at the date when the trustee's title accrues.

These principles were applied by their Lordships of the Privy Council in an Indian case (1), the facts of which were as follows :—

A had obtained a decree for Rs. 53,200-9-0 dated 15th June, 1926, in the Bombay High Court against three persons. These persons were plaintiffs in a suit then pending in the Madras High Court for partition of certain joint family property between the plaintiffs and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on the 5th December, 1922, a preliminary decree by consent was passed. On 20th December, 1926, the preliminary decree in the Madras Court was attached in the Madras High Court by A's father in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court. On 15th September, 1928, an order was made by the District Court of Secunderabad (A foreign Court so far as British India is concerned) on a creditor's petition adjudging as insolvents two of the plaintiffs in the Madras partition suit. The official receiver of Secunderabad was made a party to the partition suit. The question that arose was as to what effect was to be given by the Madras Court to the adjudication order of a foreign court in competition with the prior attachment of a decree in the Madras Court. The learned trial judge held that the official receiver could only take subject to A's right of attachment (2). The Appellate court set aside that order on the ground that an attachment does not operate to create any title, lien or security in favour of the attaching creditor and that an adjudication order made by a Foreign court stood on the same footing as one by a British Indian Court. There was an appeal to the Privy Council, who, following *Galbraith v Grimshaw* (3) and the Scottish case of *Hunter & Coy. v. Palmer*, (4) allowed the appeal and held that the adjudication order of the Court of Secunderabad had the effect of vesting the decree in the receiver of that place only subject to A's right of attachment. In the same case their lordships of the Privy Council left open the question as to the effect of a British Indian adjudication order on such an attachment. For that see commentary under Section 51 *infra*.

In the above Privy Council case the property attached was movable property and the attachment had been effected before the order of adjudication. In a Madras case the property attached was immovable property and the attachment had been effected after the insolvent had been adjudicated by the Court of the Straits Settlements under Section 24(4), Straits Settlement Bankruptcy Ordinance No. 44 (5). After the order of

(1) *Anant Anadmanabha Swami v. Official Receiver of Secunderabad*, A. I. R. 1933 P. C. 134 : 142 I. C. 552 : 60 I. A. 167.

(2) Reported as *Venkanna v. Chennayya*, 123 I. C. 29 : A. I. R. 1929 Mad. 900.

(3) 1910. A. C. 508

(4) 1825, 3 Shaw 402.

(5) *Aiya Swami Chetty v. Official Assignee of Madras*, A. I. R. 1934 Mad. 344 : 57 Mad. 616 : 151 I. C. 14.

adjudication and also after the attachment had been effected the insolvent had transferred by a conveyance the immovable property situated in British India to the official assignee of Penang. The question which arose for decision was as to whether the attachment could prevail against the title of the official assignee. Following the above cases it was held that the material date was the date of the adjudication and not the date of the conveyance. Reliance was also placed on the following passage from Dicey's Conflict of Laws, 4th edition at page 478 :—

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"While there is no provision in any Imperial Act, giving colonial Acts as to the vesting of the immovables in the trustee of a bankrupt extra territorial validity, the requirement in the bankruptcy Act, 1914, that Courts through out the Empire should aid each other, in effect, enables a bankrupt's immovable property to be made available for his creditors in whatever part of the British Dominions it is situate subject of course to all charges on it valid by the *lex situs*."

The reference is obviously to Section 122, B. A. of 1914; for that see commentary under section 77, P. I. A. Section 122, B. A. of 1914, applies to all British Courts but it has not the effect of giving extra territorial validity to the Acts of one part of the Empire in another. The adjudication order passed by a court of one part of the Empire shall be recognised for the purposes of giving effect to Section 122, B. A. of 1914 by other parts of the Empire but only so far as it does not come into conflict with its own laws.

It remains to be considered how far an order of adjudication passed by a Court of England under the B. A. of 1914 shall be effective in regard to property, both movable and immovable situate in British India and *vice versa*. The British Indian order of adjudication will be dealt with by the English Courts on the same footing as a foreign order of adjudication except so far as it shall be recognised under section 122, B. A. 1914. A vesting order under the British Act of 1914 purports to vest all property, whether situate in England or elsewhere, in the receiver. Notwithstanding the fact that the British Act purports to have such an extended effect, it is submitted that the British Act is not intended to affect the Indian Acts in a way as to override their provisions. It, therefore, follows that section 122, B. A. of 1914 or the other provisions of the B. A. of 1914 will be recognised by British Indian Courts on the principles which are recognised in private international law.

Vesting of property in British India under more than one adjudication orders of British Indian Courts. Where there are several adjudications by different courts, all the properties of the insolvent vest in the official assignee of the court which made the prior adjudication and will not be divested from him by the subsequent adjudication of another court, even though the later adjudication is based on an earlier act of insolvency. The question of the priority of claims of the official assignees of two different High Courts should be determined by priority in the dates of the vesting orders: where it should be found that the whole property of the insolvents had vested in the official assignee of one High Court, the subsequent adjudication in another High Court has nothing to operate upon and the properties cannot vest in the official assignee of the other High Court till the previous adjudication is annulled (under Section 22 of Act III of 1909 (1)).

1. *Official Assignee of Madras v. Official Assignee of Rangoon*, 42 Mad., 121 : 49. I. C. 210 : A. I. R. 1919 M. 566 ; *Malik Ram Lal v. Official Assignee of Calcutta* 59 Cal. 1161 : 141 I. C. 883 : A. I. R. 1923 Cal. 116.

S. 1. Rights of a creditor proving in a British Indian insolvency as well as a foreign insolvency of the same person Sometimes it happens that a debtor is adjudicated insolvent in British India as well as in a foreign country and a creditor may seek to prove in both the bankruptcies, or he may seek to prove in one after he has received dividends in another. In such cases the question arises as to the terms upon which a creditor, who has proved and received dividends in a foreign bankruptcy may be allowed to prove for the balance in a British Indian bankruptcy. That he can come and prove in the bankruptcy administration in India is beyond doubt. One of the terms for a person who, after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in India is that he may do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad (1). This rule is based on the principle that one creditor shall not take part in the fund which otherwise could have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund, but this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund (2). As immovable property situate in a foreign country does not form part of the funds which may be available for distribution in a British Indian administration the law in respect of it has been thus stated by an eminent author on International Law :—"Any creditor, British or alien, may retain any payment which he can obtain out of the non-British immovables of a bankrupt or company being wound up, and, if it is only partial, may receive dividends in the bankruptcy or winding up on the residue of his debt *pari passu* with the other creditors" (3).

As regards movable property the rule is that a creditor who, after the commencement of an English bankruptcy and not by virtue of any charge prior to the bankruptcy or of a judgment in rem, obtains payment out of bankrupt's movables in a non-British country must account for such payment, if he seeks to receive dividends on the residue, if any, of his debt, but may otherwise retain it, and this, whether or not the payment was obtained by legal proceedings or whether or not the title of the trustee was asserted in such proceedings, if any; but that if he is a British creditor (or one domiciled in England or one who in his character of creditor must be regarded as English because the debt is owed to a house of business in England of which he is a member) and obtains payment out of the bankrupt's movables in a non-British country under the circumstances stated above, he must pay over the amount to the trustees in the bankruptcy, whether or not he seeks to receive dividends on the residue, if any, of his debt (4). This rule is, however, subject to one exception and that is that if the movable property of an insolvent domiciled here is dealt with by the courts of a foreign country in which it is situated in a manner contrary to the rights which our law would have given to the official assignee the person to whom it is adjudged does not hold it wrong-

1. *Selkrigg v. Davies*, 1814, 2 Dow, 230 : 14 R. R. 146 : 2 Rose 97; *Banco De Portugal v. Waddell*, 1880, 5 A. C. 161 : 42 L. J. 698 : 28 W. R. 477.

2. *Cockerell v. Dickens*, 1840, 3 Moore's P. C. 908 : 1 Mont D. & D. 45 : 18 E. R. 334.

3. West Lake's Private International Law, 7th Edition, page 182. cited in *Re Mogi & Co., The Yokohama Specie Bank, Ltd. v. S. Curlender & Co.*, A. I. R. 1926 Cal. 898 : 96 I. C. 459.

(4) West Lake's Private International Law 7th Edition p. 193 cited in A. I. R. 1926 Cal. 898 : 96 I. C. 459.

fully as against the official assignee, nor can he be made to deliver up what the foreign court has given to him even if he brings what he has received into this country (1) S. 2.

Where, however, such a person is domiciled here and the rights of both parties can be limited to those given to them by our law, our law will act in personam either to restrain proceedings being had or continued abroad or otherwise give effect to our law. The burden of proving what the foreign law is would be upon the person seeking shelter under it (2). Under the Presidency towns Insolvency Act it has been held that it is competent to the court to grant an injunction restraining proceedings in a foreign court by creditors of an insolvent who is so adjudicated in a British court. And the more so when the parties sought to be restrained carry on business within the Court's jurisdiction, even if they do not reside there and have assets within its jurisdiction which can be attached in the case of any breach of the injunction (3).

Definitions,

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "Creditor" includes a decree-holder, "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;

(b) "District Court" means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns, the Town of Rangoon and the limits of the ordinary original civil jurisdiction of the Chief Court of Sind as defined in section 2 of the Presidency-towns Insolvency Act, 1909;

(c) "Prescribed" means prescribed by rules made under this Act;

(d) "Property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

(e) "Secured Creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor; and

(f) "Transfer of property" includes a transfer of any interest in property and the creation of any charge upon property.

(1) *Sill v. Worswick*, 1791, 1 H. Bl. 665; *Phillips v. Hunter*, 1795, 2 H. Bl. 402; 2 R. R. 146; *Yokohama Specie Bank Ltd. v. S. Curlender & Co.*, A. I. R. 1926 Cal 898; 96 I. C. 459.

(2) *Hunter v. Potts*, 1791, 4 T. R. 182; 2 R. R. 53; *Phillips v. Hunter*, 1795, 2 H. Bl. 402; 2 R. R. 146. *Lloyd v. Guibert*, 1865, 1 Q. B. 115; 13 L. T. 602.

(3) *Sumermall Surana, Re.*, 186 I. C. 141; A. I. R. 1932 Cal. 124; *In re Binraj Sagarmal*, 39 C. W. N. 1135; 62 Cal. 659; see also *Official assignee v. Ghanshamdas Hotchand*, 148 I. C. 941 (2); A. I. R. 1934 Sind 44.

S. 2. (2) Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908, and not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code.

History. In the Act 3 of 1907 section 2 was the "Definitions" section. Clauses (a) and (g) of section 2 (1) of that Act, which defined an available act of insolvency and the word, "The Court" respectively have been omitted. The first clause was superfluous even in the old Act. As for the importance and relevancy of the definition of the word "The Court" in the old Act and the effect of its omission in the present Act, see commentary under section 80 of the present Act, where the question as to whether an official receiver is a Court or not has been considered. Clause (c) of the Act 3 of 1907 was reproduced as clause (b) of the present Act, which too has now been amended. By section 11 of the Insolvency (Amendment) Act, 9 of 1926, the words "The Town of Rangoon and the limits of the ordinary original civil jurisdiction of the Court of the Judicial Commissioner of Sind as defined in section 2 of the Presidency-towns Insolvency Act, 1909" were substituted for the words "And of the Town of Rangoon" in clause (b) of sub-section (1). Again by the Sind Courts (Supplementary) Act, 34 of 1925, the words "The Chief Court of Sind" are to be read for the words "Court of the Judicial Commissioner of Sind" in the same clause.

The first amendment was necessary when the provisions of the Presidency-towns, Insolvency Act, were made applicable to Karachi in pursuance of the recommendation of the Civil Justice Committee. The definition of "*Secured creditor*" in the old Act ran as follows:—"Secured creditor includes a landlord, who, under any enactment for the time being in force has a charge on land for the rent of that land." The definition in the present Act purports to be exhaustive and the specific mention of a landlord having a charge on land for the rent of that land is not made, as the definition now given is wide enough to include such a person. The present Act also contains a new definition of the expression "*transfer of property*," which did not exist in the old Act. Clauses (b), (d) and (e) of the old Act are now respectively clauses (a), (c) and (d) of the present Act. Sub-section (2) of the old Act was the same as present sub-section 2, except that the reference in the former was to the Code of Civil Procedure, Act 14 of 1882, which has since been repealed and replaced by the Code of Civil Procedure, Act V of 1908.

Analogous Law. The "interpretation" or "definitions" sections of the Presidency-towns Insolvency Act and the Bankruptcy Act of 1914 are sections 2 and 167 respectively. For our present purposes all that we need notice is that the definition of "*property*" given in Presidency-towns Insolvency Act is the same as in the present Act. The definition of "*secured creditor*" in the present Act is the same as that given in section 167, B. A. of 1914. Section 167, B. A. of 1914, also gives the definition of property which is much more comprehensive than that given in the Indian Acts.

Unless there is anything repugnant in the subject or context. The definitions given in the section are to be followed generally unless the subject or context definitely indicates another meaning repugnant to the meaning given in the section. It has been held by the Privy Council that a father's power to dispose of the joint property in a joint Hindu

family which vests in the receiver on the insolvency of the father does not come under the definition of the word "property" as given in the Act on the ground that there is something repugnant in the subject which makes it inapplicable. That power is not absolute but conditional on his having debts which are liable to be satisfied out of that property, and section 2 seems to contemplate an absolute and unconditional power of disposal (1).

Clause (a); "Creditor," "debt" and "debtor." The definitions are not exhaustive. The word 'creditor' occurs in the Act in more than one place. For the meaning of the word 'creditor,' see commentaries under sections 9, 28 and 54.

'*Debt.*' As to what is a debt and what debts are provable in insolvency, see commentary under section 34. As to what can be a good petitioning creditor's debt, see commentary under section 9. A judgment-debt is included in the word 'debt' and the court has jurisdiction to inquire into the genuineness of a judgment-debt as well. For that see commentary under section 9.

'*Debtor.*'—As to who can be adjudged insolvent under the Act, or,—which is the same thing, as to who is a debtor within the meaning of the Act, see commentary under section 7.

Clause (b); "District Court." See commentary under sections 3 and 75.

Clause (c); Prescribed :—The word 'prescribed' means prescribed by rules laid under the Act. The reference is obviously to section 79 of the Act, which confers rule-making powers on the High Court with the sanction of the Provincial Government. This word also occurs in many sections of the Act.

Clause (d); Property. The definition of the word property given here is not exhaustive, *vide* "includes." In section 28 it is provided that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the receiver. The subject has been treated at length under that section.

Clause (e); Secured Creditor.—There are several sections of the Act which deal with the rights of secured creditors. See Commentary under sections 28 and 47. It is a question of fact depending upon the agreement of the parties or the course of dealings between them as to when a person holds a charge or lien on the property of another person. A bank claiming a lien on the share of its solvent members is a secured creditor (2). In a case, where the simple mortgagee of certain goods sued for money due without asking for a decree that the mortgage goods be sold but urged at the hearing that he had a remedy against the goods and in the course of the arguments insisted upon his rights; and the court passed a decree which was not clearly expressed but the object of which was to give the plaintiff recourse to the goods; it was held that the position of the plaintiff-decree-holder was that of a secured creditor (3). In another case, J handed over his spare money to a bank

(1) *Sat Narain v. Behari Lall*, 84 I. C. 893; 52 I. A. 22; 6 Lah. 1; A. I. R. 1925 P. C. 18.

(2) *Kalla Gella, in re*, 150 I. C. 274; A. I. R. 1933 Sind 355.

(3) *Munna Lal & Sons v. Official Receiver Jhansi*, 137 I. C. 208 (2); A. I. R. 1932 All. 551.

S. 3. and received a note book in which it was stated that the money was for safe custody. As a matter of agreement in practice, however, J used to secure borrowers who would agree to pledge ornaments by way of security with the money deposited. The borrower was taken by J to the manager of the bank or he would go to the manager of the bank with a note from J. No money of J used to be lent out by the bank without any security of ornaments. Similarly when a man came to redeem his ornaments, he would either take J to the bank or take a note of his to the manager of the bank and on payment the ornaments would be released. It was held that J was a secured creditor of the bank (1). For other cases, see commentary under sections 28 and 47.

Clause (f); Transfer of Property.—See commentary under sections 6, 28, 53, 54 and 55. These sections deal with transfers of property by the insolvent in favour of third persons.

Sub-Section (2).—Section 2, Civil Procedure Code, 1908, contains the definitions of many other words which are not defined in the present Act. For instance see the words, 'decree,' 'District Judge,' 'Judgment-debtor,' 'Movable property,' 'order' and so on. These words are used in the present Act in the same sense in which they have been defined in the Civil Procedure Code.

PART I.

CONSTITUTION AND POWERS OF COURT.

S. 3. (1) The District Court shall be the Court
Insolvency jurisdic- having jurisdiction under this
tion. Act:

Provided that the Local Government may, by notification in the local official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court.

Scope.—Part one of the Act comprises three sections which deal with the constitution and powers of the courts, exercising jurisdiction under the Act. Section 3 defines the constitution of the insolvency courts, section 4 the powers of the insolvency court and section 5 defines the procedure of the insolvency court.

The present section corresponds to section 3 of the Act 3 of 1907.

Sub-section (1); District Courts.—A district court has been defined in section 2, sub-section 1 clause (b) as meaning a principal civil court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns, the town of Rangoon and the limits of the ordinary

(1) *Allahabad Union Bank Ltd., v. Jageshwar Prasad*, 100 I. C. 62 : 49 All. 876 : A. I. R. 1927 All. 98.

original civil jurisdiction of the Chief Court of Sind as defined in section **S. 3.** 2 of the Presidency-towns Insolvency Act, 1909. These are the courts of the district judges who have jurisdiction to entertain the application for insolvency. The court of the additional district judge is a district court for the discharge of any of the functions of a district judge which the district judge may assign to them, and in the discharge of their functions they shall exercise the same powers as the district judge (1). The court of the additional district judge is not a court subordinate to the district judge and no notification under proviso to sub-section 1 is necessary. An appeal will therefore lie to the High Court from an order of conviction and sentence passed by it under section 43, P. I. A. 1907 (2).

Proviso.—Ordinarily it is the court of the district judge which has jurisdiction under this Act, but these powers can be conferred on a court subordinate to a district court by the Local Government by notification in the local Official Gazette. The object of the proviso to section 3 subsection (1) is to enable the Local Government, by conferring jurisdiction upon subordinate courts, to release the district court of the work arising under the Act and in considering the section and the notification by Government the court should give effect to that presumed object rather than put upon the words of the section a narrower construction. And in cases of doubt it is entitled to have recourse to the argument from convenience in interpreting a statute. Applying these principles to the construction of section 25, Bom. Civil Courts Act, 1869 and a Government notification, it was held by the Bombay High Court that a first class subordinate judge has jurisdiction to entertain proceedings under the Act in cases arising in the whole district under the special jurisdiction conferred by section 25 and in view of the notification by the Bombay Government giving jurisdiction to subordinate courts to exercise jurisdiction in all classes of cases arising within their local limits (3). In Burma, Government notification No. 207 invests every Assistant District Court in Burma with jurisdiction to hear and determine any class of cases in which the debts of the insolvent do not amount to over fifteen thousand rupees. The language of the notification is vague and its amendment has been suggested (4).

As the old section is re-enacted in the new Act, under section 24 of the General Clauses Act a notification issued under the old section would remain in force even under the new Act (5). If a court subordinate to a district court is specially invested with powers under section 3, it will have jurisdiction unless and until it is withdrawn by the Local Government and it will not require to be reinvested in the case of transfer or removal of its presiding officers (6).

Effect of absence of notification under proviso.—A court subordinate to a district court will not have any jurisdiction to entertain an insolvency petition unless it has been specially invested by the Local Government in the manner prescribed here. Nor such a court will have

(1) Section 8, Bengal, N. W. P. and Assam Civil Courts Act, 12 of 1887.

(2) *Makhan Lal v. Siri Lal*, 9 All. L. J. 371 : 14 I. C. 162 : 34 All. 382.

(3) *Abaji Vithal Paranjpe v. Narhari Keshaw Dharap*, A. I. R. 1927 Bom. 460 ; 51 Bom. 809 : 104 I. C. 780.

(4) *S. P. K. Chettiar v. S. Datt*, A. I. R. 1936 Rang. 223 : 162 I. C. 1001 : 14 Rang. 280.

(5) *Chatturbhuj Mahesri v. Harlall Agarwalla*, 80 I. C. 858 : A. I. R. 1925 Cal. 335.

(6) *Devi Prasad v. Stanley Ray*, 6 A. L. J. 483 : 2 I. C. 223.

S. 3 jurisdiction over a case because it has been transferred by the district court to it. The reason is that in the absence of any notification of the Local Government investing the subordinate court with jurisdiction, the district judge's order transferring a petition to the subordinate court is *ultra vires* (1). If the notification investing a court with powers under the Act is made after the presentation of the petition and before the order of adjudication, it appears that the defect is curable (2). In the case last cited it was so decided on the following facts which were somewhat peculiar. A petition in insolvency addressed to the District Judge was presented to a judge of the court of Small Causes who ordered notices to be issued, and subsequently adjudicated the petitioner to be insolvent. The District Judge on appeal affirmed the order of the judge of Small Causes Court. In neither court was any plea as to jurisdiction taken. It was objected, before the High Court in revision, against the order adjudicating the petitioner insolvent that on the date on which the petition was presented to the Judge of Small Causes no jurisdiction under section 3, clause (i) of the Insolvency Act, III of 1907 had been conferred upon him. Such jurisdiction was, however, conferred upon him a few days after the presentation of the petition so that he possessed it on the date on which he directed notices to be issued and gave his final decision. Having regard to the very late stage of the case at which the objection was raised, also to the fact that the petition was addressed to the District Judge, who had jurisdiction, and that as powers had been conferred upon the Judge of Small Causes, the case could have been transferred to his court, it was held that the case had been properly entertained and decided by the Judge of Small Causes (3).

Court so invested shall have concurrent jurisdiction with the district court.—Once the court has been invested with jurisdiction it has all the powers which the district court has under the Act. If the same local jurisdiction is assigned to two or more subordinate judges, the district judge may assign to each of them such civil business cognisable by the subordinate judge, subject to any general or special order of the High Court. Hence when the court of the subordinate judge is invested with powers under the proviso of section 3 within the local limits of its jurisdiction, it does not follow that he has jurisdiction only in cases arising within the local limits of his jurisdiction as fixed by the district judge under section 13 sub-section (2) of the said Act, but that he has concurrent jurisdiction with the district judge in entertaining applications for insolvency (4). Though under the proviso the court of the district judge and that of the subordinate judge have concurrent jurisdiction, orders made by the subordinate judge, when he has seisin of the case, can only be interfered with by the district court under the provision of section 46, P. I. A., 1907, or under the powers conferred by the Code of Civil Procedure in regard to civil suits as provided by section 47, P. I. A., 1907. Where therefore a subordinate judge invested with insolvency jurisdiction declines to take action against the insolvent under section 43 sub-section (2), P. I. A., 1907, no appeal lies to the district court, and the latter court cannot interfere with the order. (5)

876. (1) Prem Chand Indiji v. Soleti Gopalappa, A. I. R. 1924 Mad. 898 : 75 I. C.

(2) Debi Prasad v. Stanley, 6 A. L. J. 483 : 2 I. C. 228.

(3) Debi Prasad v. Stanley Ray, 6 A. L. J. 483 : 2 I. C. 228.

(4) Sanker v. Vithal, (1897) 21 Bom. 42.

(5) Digendra Chandra Basak v. Ramani Mohan Goswami, A. I. R. 1919 Cal. 900 : 48 I. C. 333.

Appeal—An appeal from the decision of a subordinate judge in insolvency jurisdiction lies to the district judge and not to the High Court. It may be amended but it has been expressly provided by section 5 of the Act (1)

Section 3 and Letters Patent (Lahore, clause 9.—The word “suit” in clause 9, should be interpreted as to include proceedings in insolvency and the High Court under its extraordinary powers has jurisdiction to transfer a proceeding in the insolvency from the Lower Court to itself for disposal. Section 3 does not exclude the extraordinary civil jurisdiction of the High Court; and the expression in section 5 sub-section (2), “subject as aforesaid” only means subject to the ordinary civil jurisdiction of the district courts in insolvency matters, i. e., in all proceedings in insolvency the proceedings must commence in the district court. But once it has been commenced there, there is no bar to the High Court’s power under the Letters Patent to transfer the proceedings to itself (2).

S. 4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor’s estate and on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

History.—The section is new. The Act 3 of 1907 did not contain any provision expressly authorising the court to decide questions of title

(1) *Madhorao Deorao v. Naga*, A. I. R. 1923 Nag. 80 : 71 I. C. 87.

(2) *Harkishan Lal v. Peoples Bank of Northern India*, A. I. R. 1936 Lahore 608 : 17 Lah. 582 : 160 I. C. 972.

S. 4 against the interests of strangers to insolvency proceedings. The absence of any express provision in the old Act gave rise to a conflict of decisions. It was held by the Allahbad High Court that the insolvency court had inherent jurisdiction to decide questions of title in property alleged to be that of the insolvent (1). In *Bansidhar v. Kharagjit* (2) a transfer executed by the insolvent of his property was impeached by the receiver as fictitious and the receiver applied to be put in possession of the property under section 18, P. I. A. 1907, (now section 56 P. I. A. 1920), it was contended that the remedy of the receiver was by a separate suit. It was admittedly a transaction not coming within section 36 P. I. A. 1907, (now section 53, P. I. A. 1920). In overruling the above contention, the learned judges made the following remarks :—

“The learned vakil for the appellant contends that, if the case does not come within section 36 of the Act, the receiver should be left to bring a separate suit. We cannot accept this contention. It is true that the Provincial Insolvency Act contains no such provision as section 102 of the English Bankruptcy Act, which expressly empowers the bankruptcy court to decide ‘all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice and making a complete distribution of property in any such case,’ but it is the duty of a receiver appointed under the Indian Act, and of the court itself where no receiver is appointed, to take possession of the property of the insolvent, and section 18 of the Act empowers the court, where it appoints a receiver, to remove any person, in whose possession or custody any property of the insolvent is, from the possession or custody thereof, provided of course that the insolvent had a present right to remove him.”

The Calcutta High Court dissented from the Allahbad view and it took a narrower and more restricted view about the scope of the court's power under section 18, (now section 56) (3). The Allahbad case of *Bansi Dhar v. Karagjit* (4) was referred to, considered and after a consideration of the relevant sections of the Act itself, dissented from. It held: “The power of the insolvency court to inquire judicially whether a third party in possession claiming on his account is a mere benamidar of the insolvent, and to enforce an order requiring him to deliver possession to the receiver, depends, in cases which do not come within section 36, Provincial Insolvency Act, on a true construction of clause 3, section 18. Where the benami character of a person is admitted or where a veil is transparent and the insolvent is in substantial beneficial possession, the court may order the delivery of the property to the receiver ; but where the alleged benamidar is in possession claiming adversely to the insolvent, then any claim made by the receiver or by a creditor that the property is really the property of the insolvent, can only be enforced by a suit in the regular courts. The Madras High Court followed the same opinion as that of the

(1) *Khushhali Ram v. Bholar Mal*, 37 Allahbad 252 : A. I. R. 1915 All. 81 (1) : 28 I. C. 573 ; *Bansi Dhar v. Kharagjit*, (1914) 37 Allahbad 65 : 26, I. C. 926 : A. I. R. 1914 All. 220 (2).

(2) (1914) 37 Allahbad 65 : A. I. R. 1914 All. 220 (2). Also see (Kochu) *Mahomed Asan Tharagan v. Sankaralinga Mudaliar*, 44 Mad. 524 ; A. I. R. 1921 Mad. 204 : 62 I. C. 495.

(3) *Nilmony Chowdhury v. Durga Charan*, A. I. R. 1919 Cal. 965 (2) : 46, I. C. 377 ; *Joy Chandra Das v. Mahomed Amir*, 44 I. C. 143 : A. I. R. 1918 Cal. 147.

(4) A. I. R. 1914 Allahbad 240 (2) : 37 Allahbad 65 : 26, I. C. 926.

S. 4. Calcutta High Court (1). Reference may also be made to commentary under section 56, where the scope of that section is considered. The present section sets at rest the conflict outlined above. As observed in the Statement of Objects and Reasons: "A further defect in the Act is the absence of provisions sufficiently defining the power of courts to decide questions of law and fact arising in insolvency proceedings. This question has been recently the subject of conflicting decisions and it is desirable that this conflict between the High Courts should be terminated, and having regard to the prevalence of benami transactions in India and the importance of arming courts with adequate powers of the speedy realization of assets in the interests of creditors, the Government of India are of opinion that the courts should be given full powers to decide all questions raised in insolvency proceedings, i.e., the effect of a decision of the insolvency court on any question of this sort should be *res judicata* (2).

The section has been modelled on the basis of section 7, Pt. I. A. as it stood before the amendment of 1926, which we shall presently consider.

Analogous Law.—Section 7, Pt. I. A. as it stands now, runs as follows :—"Subject to the provisions of this Act, the court shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognisance of the court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section."

Section 7, Pt. I. A., on which section 4 of the Provincial Insolvency Act is based, is itself based on the first part of section 72 of the Bankruptcy Act, 1869, except for the proviso as to which see later. Section 72, B. A., 1869, was in the following terms :—

"Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priority and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." The Bankruptcy Act, 1869, was repealed by the Act of 1883, and section 72 was re-enacted as section 102 (1); and a proviso in the following words was added in section 102 (1); "Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money's worth or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." The Bankruptcy Act, 1883, was repealed by the Act of 1914, and section 102 (1) of the Act of 1883, including the proviso as to County Courts, was re-enacted as section 105 (1) in the Act of 1914.

(1) *Narasimha v. Virasghavahli*, (1917), 41 Madras 440 : 6 L.W. 684 : 42 L.C. 525 : 1917 M. W. N. 857 : A. I. R. 1918 Mad. 702; *Maddipoti Perumina v. Gandrapu Krishnayya*, (1918), 8 L.W. 136 : 47 L.C. 308 : A. I. R. 1919 Mad. 393, c/4 (Kochu) *Mahomed Asan Tharagon v. Sankaralinga Mudaliar*, (1921) 41 Mad. 524 : 62 L.C. 495 : A. I. R. 1921 Mad. 204.

(2) Statement of Objects and Reasons to Act 5 of 1920.

Section 7, Presidency-towns Insolvency Act, excepting the proviso, is in almost the same terms as sub-section (1) of section 4, P. I. A., 1920 S. 4.
(1). The word "title" does not occur in section 7, and it is used in section (4) to emphasise the fact that a Provincial Insolvency Court has the power to decide questions of title between the receiver and third persons (2). Sub-sections 2 and 3 of section 4, P. I. A., 1920 do not occur in section 7, P. I. A., but the omission does not make any difference. The decisions of the insolvency Court on questions of title under the Presidency-towns Insolvency Act, bind the parties to the proceedings just in the same manner as they do under the Provincial Insolvency Act. The discretion which the Provincial Insolvency Court has under sub-section 3, is also possessed by the Presidency-towns Insolvency Courts and under both the Acts the insolvency courts are not bound to decide questions of title in all cases; they have the power to refer the parties to a separate suit in the ordinary courts.

The history of the proviso to section 7, Pt. I. A., has been noticed at length under section 59-A P. I. A., 1920, which corresponds to section 36, Pt. I. A. The jurisdiction of the insolvency court under the Presidency-towns Insolvency Act, is limited by the proviso to the extent mentioned therein. Where no question of the applicability of section 36 arises the powers of the Courts under both the Acts are the same (3). It is not necessary for our present purpose to consider how far the proviso, as it stands, carries out the real intention of the legislature. The important point to note is that the Provincial Insolvency Court was given the powers of private examination of persons without restricting its jurisdiction in ordering other persons to deliver possession of property, etc., unlike the amendment of the Presidency-towns Insolvency Act, 1926. The language of the proviso appears to have been borrowed from the corresponding proviso to section 105 (1), B. A., 1914, but by making the reference to section 36 in it, its scope has been restricted, though it appears, quite unintentionally, by the legislature.

In the English section the proviso makes a distinction between claims arising out of the bankruptcy and claims not so arising. The distinction existed in the judicial decisions even before the proviso was enacted and in English Law, it has a well-defined meaning. We shall consider this expression under the present section elsewhere.

Retrospective effect of the section.—As stated before, the Allahbad High Court had ruled that the insolvency court had jurisdiction now conferred by section 4, under the Act 3 of 1907. It has therefore now held that section 4 does not invest insolvency courts with jurisdiction which did not exist formerly and that it simply declares the law (4). The Madras High Court, which under Act 3 of 1907, was in favour of the view that the courts had no such jurisdiction under that Act, has now held that section 4 has conferred powers which are wider than those

(2) See *Fool Kumari Dasi v. Khired Chandra Das Gupta*, (1927), 102 I. C. 115 : A. I. R. 1927 Cal. 474.

(1) *Palanivelu Odsyar v. Official Receiver, Tanjore*, 185 I. C. 789 : A. I. R. 1932 Mad. 66.

(3) Re *Kancherla Krishna Rao*, (1928), 51 Madras 540 : 112 I. C. 149 : A. I. R. 1928 Madras 732; *Mrs. Evelyn Popali v. Official Assignee of Madras*, A. I. R. 1937 Mad. 775.

(4) *Sita Ram v. Beni Pansad*, 84 I. C. 790 : 47 Allahbad 263 : A. I. R. 1925 Allahbad 221.

under the old Act (1). In the case last cited the court decided that a purchaser from the receiver could be delivered possession of the insolvent's property by the insolvency court and in doing so it relied upon the wide powers given by section 4, distinguishing the earlier rulings of the same High Court on the addition of section 4 in the present Act. S. 4
(1).

Where an order of adjudication has been passed under the old Act and a claim to the properties is advanced after the enforcement of the new Act and the claim is determined according to the procedure prescribed by the new Act, the order is final (2).

Application of the section.—The section defines the powers of the court in deciding questions of titles between the insolvent or his estate on the one hand and persons claiming against him or it on the other. The section will come into operation whenever a question of title will arise in insolvency proceedings. Whenever a question of title arises and conflicting claims are put in by different persons the court has two courses open to it. It may proceed to decide the question of title so raised, or it may proceed under the third sub-section without deciding the question of title (3). Where it neither decides the question of title nor holds under sub-section 3 that the debtor has a saleable interest in the property and proceeds to sell the property, its order is bad in law and cannot be upheld (4). Where the sons of the insolvent object to the sale of insolvent's property by the official receiver on the ground that they were divided from the insolvent and that their shares should not be sold, the property should not be sold without first deciding the question under section 4 (5). It is obvious that the question of title can be decided by the judge himself under section 4 and that the claimant cannot apply to the official receiver nor can the official receiver adjudicate on the claim (6). Even if a judge, for some reason or another, declines to decide a question under section 4, his successor may decide it (7).

Section 4 applies only to questions arising after adjudication.—

Section 4 relates only to a decision on questions which arise in the case of insolvency, and *prima facie* there can be no case of insolvency unless there is an adjudication. Where, therefore, an application for adjudication was admitted and an interim receiver appointed it was held that an order to an interim receiver to enter upon the property of a third person is not within the scope of section 4 and that the court could not inquire, before the order of adjudication is made, whether a transfer by the applicant to a third person was a genuine one or not (8). The insolvency

(1) *Rama Swami Chettiar v. Rama Swami Iyanger*, Official Receiver, 65 I. C. 394 : 45 Madras 434 : A. I. R. 1922 Madras 147.

(2) *Shib Narain v. Lachhmi Narain*, 119 I. C. 733 : 33 P. L. R. 533 : A. I. R. 1929 Lahore 761.

(3) *Mono Mohan Roy Chowdhry v. Bhupal Chandra*, A. I. R. 1934 Cal. 122 (2) : 149 I. C. 677.

(4) *Nayan Lala Dassi v. Sambhu Nath Midhya*, 89 I. C. 761 : 52 Cal. 662 : A. I. R. 1925 Cal. 932.

(5) *Rama Samayajullu v. Official Receiver Godavari*, 92 I. C. 249 : A. I. R. 1926 Madras 360.

(6) *Vellayappa Chettiar v. Ramnathan Chettiar*, 78 I. C. 1017 : 47 Madras 446 : A. I. R. 1924 Mad. 529.

(7) *Moti Ram v. Official Receiver*, 153 I. C. 997 : A. L. R. 1934 Lahore 936 (2).

(8) *Bibbuti Bhushan v. Birendra Nath Roy*, 158 I. C. 704 : A. I. R. 1935 Cal. 558 ; See also *Wazir Singh v. Jankidas*, 97 I. C. 174 : A. I. R. 1926 Lah. 679, decided on special facts.

S. 4 court has no power under section 4 (3) to order the sale of the insolvent's interest before adjudication (1).
(1).

Scope, "subject to the provisions of this Act."—The section is very widely worded, but it is to be read subject to the provisions of this Act. The expression indicates that the power under section 4 is conferred to enable the court to decide such questions of title or priority, which cannot be decided under other sections of the Act (2). Thus where an estate has devolved on the insolvent by inheritance and there are creditors of the deceased and also creditors of the insolvent, the question of priority between the two has to be decided by the court of insolvency (3). Similarly it has been held that the court has jurisdiction to pass an order for payment to the receiver of mesne profits against a third party to the insolvency for the period during which he was in possession of property in pursuance of the transfer by the insolvent, which had been set aside under section 53 of the Provincial Insolvency Act, and that such an order is to be executed like any other order passed by a civil court. (4). The court has full power to decide the question whether the Official Receiver is entitled to the assets realised by the decree-holder from the insolvent (5). Under the section the court has jurisdiction to decide all questions of general law. Where the question raised properly falls under section 53, Transfer of Property Act, the insolvency court has jurisdiction to try the questions so raised (6).

Section 4 and sections 53 and 54 of the Act.—Sections 53 and 54 provide for the setting aside of transfers and other transactions made by an insolvent in certain cases where the conditions of those sections are satisfied. There is, however, a large class of transfers which are benami and fictitious in their nature or are impeachable as fraudulent under the general law, but which do not fall under section 53 of the Act because they took place more than two years before the date of presentation of the petition. Under the Act 3 of 1907, and under the present Act too, there appears to be a difference of opinion as to whether such transactions can be gone into by the insolvency court or that the insolvency court should leave the receiver to his ordinary remedy in the ordinary courts. The determination of the question depends as to whether sections 53 and 54 deal with jurisdiction or they merely lay down rules of evidence. The leading case is a Full Bench ruling of the Allahabad High Court (7). The Full Bench was composed of three judges, two of whom held that sections 53 and 54 do not deal with the jurisdiction of the insolvency court but only lay down rules in the manner in which evidence should be considered in certain cases arising in that court and that

(1) *Abdul Latif v. Ahmad Hussain*, 1935 A. M. L. J. 77.

(2) *Radha Krishna Thakur v. Official Receiver*, 59 Cal 1135; 139 I. C. 323; A. I. R. 1932 Calcutta 642; *Alagirisubbanaick v. Official Receiver*, Tinnevely, 54 Mad. 989; A. I. R. 1931 Madras 745; 132 I. C. 641. *Budhamal v. Official Receiver Lahore*, A. I. R. 1930 Lahore 122.

(3) *Shankar Lal v. Ismail*, 125 I. C. 28; 1930 A. L. J. 989; A. I. R. 1930 Allahabad 552.

(4) *Palanivelu Odayar v. Official Receiver Tanjore*, 135 I. C. 739; A. I. R. 1932 Madras 66.

(5) *Official Receiver Jullundur v. Labhu Ram*, 14 Lahore 724; 141 I. C. 580; A. I. R. 1933 Lahore 477.

(6) *Shikri Prasad v. Aziz Ali*, 63 I. C. 601; 44 Allahabad 71; A. I. R. 1922 Allahabad 196.

(7) *Haji Anwar Khan v. Mohammad Khan*, A. I. R. 1929 Allahabad 105; 51 Allahabad 550; 113 I. C. 819.

those sections, therefore, do not control the provisions of section 4. Sen, J. differed from his colleagues and expressed the opinion that an insolvency court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication and where the transfer was intended to be operative. In other cases the view has been adopted that sections 53 and 54 control section 4 if the transaction is a real one but that if it is inoperative from the very beginning and the insolvent had remained in possession of the property throughout, the insolvency court has jurisdiction to declare the transaction as void against the receiver (1). According to this view, if there is a real transfer which is more than two years old on the date of the presentation of the petition it cannot be challenged under section 4 in the insolvency proceedings. And in so far as it holds that, it differs from the opinion of the majority of the Allahbad Full Bench. The Allahbad view has been followed by the Patna High Court (2). And the same view has been held by the other High Courts (3).

S. 4
(1)

Transferees of insolvent.—Sections 53 and 54 of the Act deal with those transfers only to which the insolvent is a party. Where the transferee from the insolvent subsequently transfers the property to a third person such subsequent transfers cannot be challenged under those sections, nor, it is submitted, they can be challenged under any other section of the Act. It has, therefore, been held that such transfers should not be gone into and decided by the Insolvency Court under section 4 of the Act (4). Questions of title arising between an auction purchaser from the receiver and a transferee from the insolvent can be decided under the section (5).

Section 4 and section 56.—Under section 56 the court can remove any person in possession of the insolvent's property and place it in the receiver's possession. This power is however subject to the proviso that the court shall not be authorised to remove property from the possession or custody of any person whom the insolvent had not a present right so to remove. Section 56 deals with the jurisdiction of the court and controls the provisions of section 4 (1). The court cannot, therefore,

(1) *Amjad Ali v. Nand Lal Tandon*, 173 I. C. 217 : 5 Luck 742 : A. I. R. 1930 Oudh 814; *Abdul Hassan Khan v. Ragbir Prasad*, 131 I. C. 433 : 6 Luck 614 : A. I. R. 1931 Oudh 124; *Maung Ba v. Maung Kyi*, A. I. R. 1936 Rangoon 51 : 161 I. C. 687.

(2) *Biseswar Chaudhari v. Kanhai Singh*, 136 I. C. 299 : 11 Patna 9 : A. I. R. 1932 Patna 129.

(3) *Pullayya v. Official Receiver of Krishna*, 143 I. C. 372 : A. I. R. 1933 Madras 271; *Jahanwar Sultan v. Safdar Ali Khan*, 142 I. C. 97 : A. I. R. 1933 Peshawar 46; *The Official Receiver, West Godavari, Ellore v. Subbayya*, 146 I. C. 530 (2) : A. I. R. 1933 Madras 527; *Mt. Basantibai v. Rama Rao Krishan Rao*, 141 I. C. 667 : A. I. R. 1934 Nag. 47 (Opinion of Sen J. and the Oudh view approved). *Rao Ji Bapu Ji Padmakar v. K. L. Bawa Chekar*, A. I. R. 1935 Bom. 316 : 157 I. C. 680; *Ramratan Singh v. Hari*, 139 I. C. 283 : A. I. R. 1932 Nag 109; *Ram ditta mal Bhalla v. Official Receiver, Lahore*, 15 Lahore 294 : 147 I. C. 1026 : A. I. R. 1934 Lahore 365; *Karutha Syed Mohammad Rowther v. Official receiver Coimbatore*, A. I. R. 1937 Mad. 32. The insolvency court decided the question whether registration of document is invalid.

(4) *Ata Mohammad v. Mehr Chand*, A. I. R. 1935 Lahore 368; 156 I. C. 1018 : 16 Lahore 1013; *Pullayya v. Official Receiver of Krishna*, 143 I. C. 372 : A. I. R. 1933 Mad. 271; see section 53 and notes thereunder.

(5) *Moti Ram v. Official Receiver*, 153 I. C. 997 : A. I. R. 1934 Lahore 936 (2).

(6) *Haji Anwar Khan v. Mohammad Khan*, A. I. R. 1929 All 105. : 113 I. C. 819 : 51 All 550.

- S. 4** exercise, under section 4, the power which it has been expressly debarred
(1). from doing under the proviso to section 56, sub-section (3). Thus under the proviso the receiver cannot remove a tenant who holds the insolvent's property for a fixed period before the expiry of such period. This power of removal cannot be availed of under section 4 also, because section 4 should be read subject to section 56. On the insolvency of a father, the son's share does not vest in the official receiver though the father's power of disposal over the son's share for the payment of his own debts does so vest. But such power of sale terminates with the severance of the joint family status. After the severance of the joint family status the insolvency court has no jurisdiction over the son, as the insolvency court cannot act so as to effect a partition between the father and the sons.

Court's power over the sons' shares on the insolvency of a father.—The position of the official receiver on the insolvency of a father in a joint Hindu family as regards the share of a son has been considered at length under section 28. From the discussion which appears there the following propositions appear to have been established in the present state of authorities :—

1. Where the father is the manager of a joint Hindu family and he is adjudged insolvent, his share in the family property and his power, as such manager or as such father-manager, of disposal over the son's share in the joint family property vests in the receiver ;

2. The father's power of disposal over the son's share can be exercised by the official receiver in all cases where the father himself could exercise that power ;

3. The father's power over the son's share ceases to exist as soon as there has been a severance of the joint family status in any mode prescribed by Hindu Law ;

4. After severance in status, the official receiver cannot dispose of the son's share by private sale, just as the father could not do.

5. In the exercise of the father's disposing power over his son's share, it is open to the official receiver to sell the whole family property, including the interests of the son. Where only the father is adjudicated an insolvent and the sons are never made parties to the proceedings, if the receiver intends to sell the sons' interest also, he ought to proceed under section 4 and seize their share after giving them full notice (1). He has a right to ask for the annulment of a sale of the son's share held before adjudication (2).

6. Where the official receiver sells the insolvent's interests in the property including the shares of the insolvent and the insolvent's son, it is a question in which opinion is not unanimous as to whether a purchaser from receiver can obtain joint possession of the property through the insolvency court. But such a purchaser is not in any case entitled to obtain exclusive possession of the property without first filing a partition suit against the other members of the family property.

The High Court of Madras has held that the insolvency court has the power, on the insolvency of a Hindu father, to try, on the application

(2) *Fateh Chand v. Hiralal* 153 I. C. 599 : A. I. R. 1935 Nag 198

(3) *Hiralal Champal Marwadi v. Fateh Chand Parmanand*, 152 I. C. 1326 A. I. R. 1934 Nag. 271.

of a receiver, the question whether the son's interest in the family property is liable to be sold for the debts of the father's creditors (1). And this can be done even if the son does not consent to the question being tried by that court (2). But in a subsequent case of the same High Court, it has been held that where the son had already filed a partition suit against the father, there being a severance of the joint family status, the insolvency court had no jurisdiction under section 36 (section 59 P. I. A.,) to summon the sons at the instance of the official assignee, who wanted it to decide the binding nature of the debt between the father and the son, that section 7, Pt. I. A., enables the court to decide only such questions as may incidentally arise and when the son is not a party to the insolvency proceedings, no such questions can arise between him and the official assignee and the son can never be summoned under section 36, and that such questions must be decided only in a partition suit to which the official assignee is a party (3). The same High Court has also held that where the official receiver sells the insolvent's property without a previous declaration under section 4 as to the liability of the son's share, the official receiver could not apply under section 4 for recovery of the possession of the son's share but must file a separate suit for the same (4). The reason is that the sons may not be deprived of the possession unless there is effected a regular partition of the property. But where the whole interest in the property of a Hindu insolvent father and his son is sold, the purchaser from official receiver can be given joint possession of the insolvent's share only along with the sons (5).

Section 4 and section 28.—The provisions of section 4 must be limited to the exercise of the jurisdiction of the court over the properties of the insolvent which vest in the court or the receiver. Where, therefore, the District Judge held a deed of gift to be a valid one, but proceeded to direct the sale of the properties covered by the gift under the provisions of section 128, Transfer of Property Act, the order was set aside as not being authorised under section 4 (6). Section 28 (7) saves the rights of secured creditors. That does not, however, mean that the court has no jurisdiction to decide their claims (7). And where the mortgagee consents to the sale of a mortgaged property by the receiver or at any rate where the property is sold without any objection by the secured creditors and disputes arise over the distribution of the sale-proceeds, the insolvency

(1) *Doriappa Iyar v. Official Assignee of Madras*, 65 I. C. 244 : A. I. R. 1921 Madras 456; *Ramachandra Iyer v. Official Assignee of Madras*, 54 Mad. 739 : 131 I. C. 481 : A. I. R. 1931 Mad. 317 (even after there has been a division in status by a partition suit, the court can decide the liability of the sons).

(2) See *Ramasamayajulu v. Official Receiver*, A. I. R. 1926 Madras 360 : 92 I. C. 249.

(3) *Krishna Murthy Pillai v. Sundara Murthy Pillai*, A. I. R. 1932 Madras 381 : 138 I. C. 225 : 55 Madras 558; (case under section 7, Pt. I. A.)

(4) *Nachimuthu Chettiar v. Ramakkal*, A. I. R. 1923 Madras 475 : 147 I. C. 494.

(5) *Official Assignee of Madras v. Ram Chandra Ayyar*, A. I. R. 1923 Madras 55 : 46 Madras 54 : 68 I. C. 898 and *Venkataram v. Chokkier*, A. I. R. 1928 Madras 531 : 109 I. C. 516 : 51 Madras 567; *Official Receiver South Arcot v. Perumal Pillay*, 79 I. C. 322 : A. I. R. 1924 Madras 387 (1). (The proposition was not applied because it was admitted that there was no right of joint possession of the property with the sons).

(6) *Radhika Quer v. Sushil Chandra Mitra*, A. I. R. 1930 Patna 305 (2) : 124 I. C. 639.

(7) *Luxmi Industrial Bank Ltd., v. Dinesh Chandra Roy*, 113 I. C. 105 : 55 Cal. 1053 : A. I. R. 1928 Cal. 609; *Sardari Lal v. Shiv Ram*, 121 I. C. 181 : A. I. R. 1933 Lahore 93.

S. 4 court has jurisdiction to decide the questions of priority (1), or objections raised in the proceedings (2).
(1).

Section 4 and section 68—See commentary under section 68.

Scope : Questions of title.—As already considered, section 105 (1) B. A., 1914, makes a distinction between claims arising out of the bankruptcy and not so arising; and this distinction existed even before it received legislative recognition in England. The Indian Acts do not make any such express distinction, but following the English Law on the subject it has been recognised by the Indian courts and considered on the same principles which have been long established in England. The powers of the bankruptcy court under section 4 are, on the face of it, very wide and the jurisdiction so concerned extends to all sorts of claims whether arising out of the bankruptcy or not. Still in the actual exercise of the jurisdiction, which is discretionary, the above distinction has very often been observed. A claim arises out of the bankruptcy where but for the actual bankruptcy, the transaction would never have been impeached. In the matter of such claims the trustee in bankruptcy has, by the operation of the bankruptcy law, a higher title than the bankrupt. In exercising these claims the official receiver or the trustee in bankruptcy is not merely the representative of the insolvent against third persons but has certain rights and powers given to him by the statute which the bankrupt himself did not have. To take an ordinary instance, a voluntary transfer made within two years of the date of the presentation of the petition is voidable under section 53 against the receiver. But for the insolvency, the transfer was a valid one and the bankrupt himself, had not the insolvency supervened, was bound by it. In claiming to set aside such a transfer under section 53, the receiver has a higher title than the bankrupt and the claim arises out of the bankruptcy. A claim does not arise out of the bankruptcy where the receiver has no higher title than the bankrupt and can claim only the same right as the bankrupt himself would have had. A money claim against a third person by the insolvent is an ordinary instance of such a claim. The receiver has, in respect of such a claim, the same title as the insolvent had and is only the representative of the insolvent.

The following are some of the matters in which the receiver has a higher title than the insolvent would have had :—

- (i) Transfers of the property by the bankrupt which having been made between the commencement of the bankruptcy and the date of the order of adjudication come within the jurisdiction of the courts of bankruptcy by virtue of the doctrine of relation back (3).
- (ii) Possession by the bankrupt of goods of which he is the reputed owner to which the trustee in bankruptcy is entitled by the operation of the Bankruptcy Law (4).
- (iii) Transfers falling under sections 53 and 54, P. I. A. 1920.
- (iv) Transfers which are in themselves acts of bankruptcy (5).

The distinction is important in more than one respect. In the first place this is important for determining the principles on which the court

(1) *Sardari Lal v. Shiv Ram*, 121 I. C. 181 : A. I. R. 1930 Lahore 98.

(2) *Daulat Chand v. Jugal Kishore*, 130 I. C. 333 : A. I. R. 1931 Lahore 3.

(3) Section 28 (7), P. I. A. 1920.

(4) Section 28 (3), P. I. A. 1920 ; *Moolji Khimji v. Pardanani*, 143 I. C. 204, A. I. R. 1932 Sind 207 (case under section 7 Pt. I. A. 1909.)

(5) Section 6, a), (b), (c), P. I. A. 1920.

should exercise its discretion conferred by sub-section 3. In the second place it is important for determining the respective jurisdictions of the insolvency and the ordinary courts for determining questions of title. Under the English Law it has been held that the jurisdiction of the courts of bankruptcy over claims and questions of title whether arising out of the bankruptcy or not is not exclusive and that the jurisdiction of other courts over such questions exists and can be exercised by them (1). Both under the Provincial Insolvency Act and the Presidency-towns Insolvency Act, it has been held that the insolvency court's jurisdiction is not exclusive and that in the absence of an order of the insolvency court, on the merits under sub-section 2, it is open to a third person claiming against the estate of the insolvent to take the matter for decision in the ordinary civil courts (2).

S 4
(2).

As regards transfers falling under sections 53 and 54, P. I. A., 1920. it has been uniformly held that the insolvency court has exclusive jurisdiction and no ordinary tribunal can entertain the question of the voidability of the transaction under those sections in a suit or proceedings as a ground of attack or by way of defence (:). See also commentary under section 53 of the Act.

Under the Presidency-towns Insolvency Act, there appears to be a conflict of opinion as to whether in matters of voluntary transfers and fraudulent preferences the insolvency court has exclusive jurisdiction. The High Court of Madras has held the jurisdiction of the insolvency court to be exclusive (4). The Madras view has been expressly dissented from by the Bombay High Court (5), where the opinion of Sir Dinshaw Mulla was followed (6).

Sub-section 2. Res Judicata.—The jurisdiction of the insolvency court is not exclusive, but once the matter is placed before the insolvency court and that court decides to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate on the one hand and all claimants against him or the estate on the other (7).

(1) *White v. Simmons*, L. R. 6. Ch. 574; *Ellis v. Silber*, L. R. 8. Ch. 83; *Waddell v. Toleman*, 9 Ch. 1, 212.

(2) *Maharana Kanwar v. E. V. David*, 77 I. C. 57; 46 All. 16; A. I. R. 1924 All. 40; *Abdul Majid v. Abdul Haq*, 143 I. C. 475; A. I. R. 1933 Cal. 263; *Dwarka Parshad v. Mst. Sundar*, 155 I. C. 1057; A. I. R. 1935 All. 546; *Naginalal v. Official Assignee, Bombay*, 35 Bom. 473; 12 I. C. 591; 13 B. L. R. 900; *Lahori Singh v. Official Receiver, Sialkot*, A. I. R., 1957 Lahore 4.

(3) *Official Receiver v. Palani Swami Chetti*, 1925, 48 Madras 750, 757; 88 I. C. 934; A. I. R. 1925 Madras 1051. (section 53 P. I. A.); *Shazada Begam v. Gokal Chand*, 1927, 2 Luck. 651; 105 I. C. 50; A. I. R. 1927 Od. 357 (Section 53 P. I. A.) *Kaniz Fatima v. Narain Singh*, (1927) 49 All. 71; 98 I. C. 1001; A. I. R. 1927 All. 66 (Section 53, P. I. A.); *Mariappa Pillai v. Raman Chettiar* 1919, 42 Mad. 322; 52 I. C. 519 (Section 53 P. I. A. 1907).

(4) *Official Assignee Bombay v. Sandara Chari*, 1927, 50 Mad. 776; 102 I. C. 702; A. I. R. 1927 Mad. 684.

(5) *Nathuram Mantri In re*, A. I. R. 1932 Bom. 566; 141 I. C. 667; 34 B. L. R. 1166.

(6) *Sir Dinshaw Mulla's Law of Insolvency*, page 48.

(7) *Shib Narain v. Lachhmi Narain*, 119 I. C. 733; A. I. R. 1929 Lahore 761; *Basra Begam v. Shiv Narain*, 71 I. C. 979; A. I. R. 1923 Allahabad 293; *Rani Singhain v. Jawahir Lal Madan Lal*, 108 I. C. 156; 26 A. L. J. 39; A. I. R. 1928, All. 158; *Kaniz Fatima v. Narain Singh*, 98 I. C. 1001; 49 All. 71; A. I. R. 1927 All. 66; *Misri Lal Kanbaiya Lal*, 66 I. C. 863; A. I. R. 1922 All. 128; *Lalji v. Bansidhar*, A. I. R. 1933 Nag. 373; 147 I. C. 539 Explanation to section 11 C. P. C., applies to a decision under section 4; *K. Haji Abdul Latif Sahib v. Official Assignee of Madras*, 44 I. C. 847; 40 Madras 1173; A. I. R. 1918 Madras 489. (Under the Pt. I. A.); *Doriappa Iyer v. Official Assignee of Madras*, 65 I. C. 244; A. I. R. 1921 Madras 456.

S. 4
(3).

It is so on general principles, though section 11 may not in terms apply (1). In order that the sub-section may apply it is necessary not only that there should be a decision of the insolvency court but also the decision of the court should be on the merits and the court should have been acting under section 4 beyond question (2). Thus where the application to the insolvency court is rejected summarily or on the ground that it is barred by time and not on the merits or where it is not entertained and inquired into, there is no bar to a separate suit (3). Similarly a separate suit will not be barred where the question of title is left by the insolvency court to be decided by a competent civil court (4). Where the matter was never put before the insolvency court or where the matter was not prosecuted before it, a separate suit was held not barred on the ground that there was no order of the insolvency court within the meaning of sub-clause 2, of section 4 (5).

Subsection 3 ; Discretion The powers given under section 4 are discretionary (6). It is a very wide section and unless the courts feel compelled by the facts of the case to embark upon an inquiry they are not bound to do so (7). Under the corresponding English provision also the insolvency court has a discretion in the matter. The principles on which this discretion should be exercised were thus stated by Lord Selborne in *Ellis v. Silber* (8) :—

“That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come into their hands, and the mode of administering them, are subject to that jurisdiction ; and there may be, and I believe are, some special classes of transactions which under special clauses of the Act of Parliament, may be specially dealt with as regard third parties. But the general proposition that whenever the assignees or trustees in bankruptcy, or the trustees under such deeds as these, have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the court of bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority.”

These principles were acted upon first of all in *Ex. Dicken* and other cases (8), where it was held that the court of bankruptcy ought not to exercise its jurisdiction in cases of mere money demands by the trustee against a third party or where he claimed by a no higher title than the bankrupt himself had (9). In understanding these principles it is

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- (1) *Lahori Singh v. Official Receiver Sialkot*, A. I. R. 1937 Lah. 4.
 (2) *Misri Lal v. Kanhya Lal*, 66 I. C. 177 : A. I. R. 1922 All. 122.
 (3) *Deo Rao v. Vithal*, 87 I. C. 1000 : A. I. R. 1925 Nag. 363.
 (4) *Abdul Majid v. Abdulhaq*, 36 C. W. N. 621 : A. I. R. 1933 Cal. 263.
 (5) *Maharana Kunwar v. E. V. David*, 77 I. C. 57. 46 : All. 16 : A. I. R. 1924 : All. 40 ; *Dawarka Parshad v. Mst. Sunder*, A. I. R. 1935 All. 546 ; 155 I. C. 1037 ; *Veerapa Chettiar v. Vellachari Chettiar*, 159 I. C. 512 : A. I. R. 1935 Mad. 297.
 (6) *S. P. K. M. Muruga Konar & Coy., v. Official Receiver, Madura*, 1980 M. W. N. 470. A. I. R. 1930 Madras 782 : 125 I. C. 483.
 (7) *L. R.* 8 Ch. 83.
 (8) *Ramditta Mall Bhalla v Official Receiver*, 15 Lahore 294 : A. I. R. 1934 Lahore 365.
 (9) *Exp. Dickin*, 8 Ch. D. 377 ; *Exp. Musgrave*, 10 Ch. D. 95 ; *Ex. Brown*, 11 Ch. D. 148.
 (9) *Guarantee Trust Coy. of Newyork v. Hannay and Coy.*, 1915, 2 K. B. 536 per pickford, L. J. pp. 563.

necessary to understand the distinction between want of jurisdiction where the court has no power to entertain a particular application and want of jurisdiction where the court by virtue of its settled practice ought not to exercise its power (1). In all cases it is a matter of judicial discretion how the question can best be tried and that it is not an absolute binding rule that wherever the trustee's right is a higher one than the bankrupt's, the case must be tried in bankruptcy and not by action (2); and the converse that where the trustee's right is not a higher one than the bankrupt's the case must be tried by an action in the ordinary courts (3). Apart from the question of jurisdiction, it has always been a settled practice of the bankruptcy courts in England that they generally refuse to exercise jurisdiction where the trustee's right is not a higher one than the bankrupt's, *i. e.*, a money claim against a third person etc. These principles have been followed in India (4), but some of the High Courts appear to have gone beyond the settled English practice in assuming jurisdiction (5). They have assumed jurisdiction in cases where the trustee's right is not higher than that of the bankrupt even where the third person was not willing to submit to the jurisdiction or where the objection to the jurisdiction was not taken at the earliest opportunity. In England, the Court of bankruptcy will assume jurisdiction in such cases only where a third person is willing to submit to the jurisdiction (6) or where he has already submitted to its jurisdiction (7) or where the objection to the jurisdiction is not taken at the earliest opportunity (8). Following the English practice, it has also been held by the Indian High Courts under both the Acts that where the amount at stake is a large one or complicated points of law are involved in determining the question, or where the proceedings are not likely to be for the general body of creditors (9), the parties should be referred to a suit in the ordinary courts.

Section 7, Pt. I. A. 1909, before it was amended, was almost the same as section 4, Provincial Insolvency Act. And even after the amendment the jurisdiction conferred on the insolvency court is the same where the third person is not summoned under section 36 of that Act. The Madras High Court appears to be the only High Court which has gone beyond the settled practice of England and has expressed the opinion that the Indian Courts should not follow the English practice in its entirety. It has assumed jurisdiction even where a title to immovable property

(1) *Exp. Reynolds*, 15 Q. B. D. 169.

(2) *Exp. Anderson*, L. R. 5 Ch. 473; *Smith v. Baker*, L. R. 8 C. P. 350; *Halliday v. Harris*, L. R. 9 C. P. 668.

(3) *Janendra Bala Debi v. Official Assignee of Cal.* 1925, 54 Cal. 251 : 93 I. C. 334; A. I. R. 1926 Cal. 597; *Re Rassul Haji Kassum*, 1911, 13 B. L. R. 13 : 9 I. C. 344; *M. R. M. S. Chettiar Firm v. Official Assignee Rangoon*; A. I. R. 1937 Rang. 214, (case under P-t. I. A.); see also *Radhakrishna Thakur v. Official Receiver*, 59 Cal. 1135 : A. I. R. 1932 Cal. 642 : 139 I. C. 323.

(4) *Abdul Khadir v. The Official Assignee of Madras*, 1917, 40 Mad. 810 : 36 I. C. 424; A. I. R. 1917 Mad. 832; *Re Kancherla Krishna Rao*, (1928) 51 Mad. 540 : 112 I. C. 149; A. I. R. 1923 Mad. 732; *Official Assignee Madras v. Narasingha Mudaliar*, 118 I. C. 506 : 52 Mad. 717; A. I. R. 1929, Mad. 705; *Official Assignee v. Ram Chand Doulat Ram*, 143 I. C. 205; A. I. R. 1932 Sind 203.

(5) *Exp. Fletcher*, 9 Ch. D. 381.

(6) *Exp. Davis*, 9 Ch. D. 86.

(7) *Exp. Swinbanks*, 11 Ch. D. 525; *Exp. Butters*, 14 Ch. D. 265.

(8) *Icha Shanker Jaduram v. Banamal Gulzarimal*, 144 I. C. 678; A. I. R. 1933 Sind 185; *R. Kanakasabathi Chettiar v. Jomathi Meenakashi Amal*, A. I. R. 1935 Mad. 720 : 156 I. C. 677; *The official assignee of Mad. v. Vedavali Amal*, 40 Mad. 810; A. I. R. 1917 Mad. 832 : 36 I. C. 524.

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(3).

situate outside the original civil jurisdiction of the High Court or even outside the Presidency under section 7 of the P-t. I. A. (1). In regard to money claims against third persons also, it has ruled that the court should assume jurisdiction in simple cases capable of easy and speedy proof, though no money claim in which a difficult question arises should be dealt with by way of motion, nor should large claims (2). The extent to which the Madras High Court will go under the section in departing from the ordinary English practice will appear from the following passage from the judgment of Coutts-Trotter, C. J. "It was said on the authority of the English cases cited by my learned brother that, where a debt was not admitted, being a debt as to which the official assignee stood in no higher position by reason of the special provisions of the bankruptcy law than the debtor himself, the matter could not be tried within the jurisdiction of the Insolvency Court. That that is the law in England, I do not question. I do not think it is or was intended to be, the law in India under the Presidency-towns Insolvency Act. It is obvious that the Indian statute aims at relieving the official assignee in charge of a bankrupt's estate in suitable cases, from incurring the heavy burdens of institution fees which would necessarily be incurred if he were compelled in all cases to have recourse to ordinary suits; see section 115 of the Act. I am quite content to leave it as a matter of discretion to the learned judge as to whether in any given case he should deal with such a claim in the Insolvency Court here or refer it to the machinery of an ordinary suit. It must be remembered that the Court-fees in an ordinary suit in England are very small and that no inconvenience is caused and no obstruction is put in the way of the bankrupt's estate by confining the jurisdiction of the bankruptcy court to claims where the title of the trustee of the bankrupt stands on a higher footing than would have been the case if the debtor had been suing himself. In India it is quite a different matter and in many cases it would be quite impossible to obtain a sum out of such estate as is actually in the hands of the official assignee sufficient to institute proceedings for the recovery of outstanding debts, though the official assignee's claim may be a perfectly good one. I am quite content that it should be left with the judge in insolvency to decide on the balance of convenience whether it is best to try such case himself, or to relegate their disposal to the ordinary courts; and that is a discretion which, when exercised by him, an appellate court would interfere with only on the grounds which are well-known and must necessarily be of rare occurrence. It is quite easy for the judge who tries the summons to insist upon the official assignee giving to the other side what is in effect a pleading giving detailed particulars of the nature of his claim and to give full discovery of documents, if that is sought for. On the other hand, there may be cases where the person sought to be made liable to the estate lives at a great distance, or where the estate has ample funds for payment of the necessary institution fee, in which it would be just and right for the learned judge in insolvency to decline to deal with the matters here in Madras." Having regard to the balance of convenience it was held by the Sind High Court in proceedings which were started on an application under section 7, and were already three years old, and where the property in dispute was situate

(1) Official Assignee of Madras v. Vedavali Amal, A. I. R. 1917 Mad. 832 : 40 Mad. 810 : 36 I. C. 524; In the matter of Kencherla Krishna Rao, A. I. R. 1928 Mad. 732 : 112 I. C. 149 : 51 Mad. 540.

(2) Official Assignee Madras v. Narasingha Mudaliar, A. I. R. 1929 Mad. 705 : 118 I. C. 506 : 52 Mad. 717.

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(3).

and the parties were residing within the jurisdiction of the court and no prejudice was going to be caused to the party against whom the action was taken if he was required to defend his title to the property in such proceedings instead of a regular suit, it was held that the insolvency court should not decline to exercise jurisdiction (1). In a case in which the party concerned is himself the creditor and the matter is one which could be expeditiously decided the court will decide it (debt due to the insolvent) (2). The case for not assuming jurisdiction by the insolvency court in cases where the receiver's title is not higher than the bankrupt's, was best put by Rankin, J. in a Calcutta case (3). The facts in that case were that a lady was alleged by the official assignee to be the mere benamidar for the insolvent and she was summoned under section 36, P-t. I. A., and as a result of the examination of the lady the official assignee moved the court for a declaration that she was a mere benamidar for the insolvent, Rankin, J. stated as follows:—

"The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have to commence a suit against the lady for a declaration that she was a benamidar for the insolvent. But under section 7, P-t. I. A. this Court in its insolvency jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person who carries on a retail business, becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the insolvency jurisdiction to try such a question.

"I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within section 55 or 56, Pt. I. A. There are many other cases. There may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the opposite party cannot bring himself within the protective sections. There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under section 53, Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to the creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's is not a rule of law, in the sense that the insolvency court has not the jurisdiction to entertain such a case; and, secondly, that it is not restricted only to sections 55 and 56. But the rule is well established, if it is not rigid and it is necessary in fairness to third parties who cannot help their creditors, debtors or *cestuis*

(1) Official Assignee v. Ram Chand Doulat Ram, A. I. R. 1932 Sind 208 : 143 I. C. 203, not approving the expression of opinion in Official Assignee v. Mst. Parmeshwari Bai, A. I. R. 1932 Sind 50 : 135 I. C. 269 : (Case under S. 7 Pt. I. A. 1909).

(2) Dhudhchand v. Shripad, 153 I. C. 990 : 8 R. N. 111 : 18 N. L. J. 14.

(3) Janendra Bala Debi v. Official Assignee of Cal., A. I. R. 1926 Cal. 597 : 54 Cal. 251.

S. 4 *qui trustent* going insolvent, who may live far from Calcutta, and whose (3). right may be difficult to ascertain apart from the regular suit. It is necessary also in the interests of this court which cannot undertake in its insolvency jurisdiction to collect debts all over India or to decide on motion all classes of disputes merely because an insolvent or his estate is a party."

The following propositions may be deduced from the foregoing discussion :—

(a) The insolvency court has jurisdiction to decide all questions of title, irrespective of the fact that the claims of third parties are involved and of the further fact that that claim arises out of the bankruptcy or not.

(b) That the assumption of jurisdiction by the insolvency court is a matter of judicial discretion in all cases, except cases falling under sections 53 and 54 in respect of which it has been held under the Act that the insolvency court has exclusive jurisdiction ;

(c) That in exercising its discretion for assuming jurisdiction over claims or demands against third persons in which the receiver has got a higher title than the bankrupt's, it shall look to the facts of each case and will ordinarily decline to assume jurisdiction where the value of the property involved is large or where complicated questions of law and fact arise or where the third parties and their witnesses reside at a great distance from the court or where it shall, having regard to all the circumstances of the case, it is not convenient to decide the matter in insolvency proceedings. The exercise of jurisdiction need not necessarily be exactly on the same principles on which it has been exercised in England.

Assumption of jurisdiction by the Insolvency Court in matters which are already before the ordinary courts.—As we have already seen, the jurisdiction of the insolvency court is co-extensive with that of the ordinary courts. It may be that the matter is already before an ordinary court of law in a suit or other proceedings at the time when an application under section 4 is made to the insolvency court. The two questions which will arise are :—

(i) Has the court jurisdiction to entertain the application and stay the proceedings in the ordinary court by injunction or otherwise ?

(ii) If it has jurisdiction, when should it exercise its discretion in assuming jurisdiction ?

In England it has been held that the court has such jurisdiction and in a proper case it will be exercised. Thus where the assignee of a bankrupt applied to the court of bankruptcy for an injunction to restrain a person, who claimed to have purchased from the bankrupt prior to the bankruptcy certain pictures, from selling these pictures, on the ground that the sale was as against him void, the injunction was granted(1). Similarly where a trustee in liquidation was in possession of some goods upon which there was a bill of sale and refused to give them up on the ground that the bill of sale was invalid whereupon the holder of the bill of sale commenced an action of trover against the trustee, the judge of the county court restrained the action (2). In another case a bill in

(1) *Exp. Anderson* L. R. 5 Ch. 473.

(2) *Exp. Cohen*, L. R. 7 Ch. 20; *Exp. Macdonald*, 24 L. T. 475,

Chancery was filed against an executor by a creditor of the testator for the administration of the testator's estate which consisted of a business in which the executor was individually interested as partner and a receiver in this suit was appointed and, after the bill was filed, a resolution under section 125 of the Act of 1869 for the liquidation of the executor's affairs was passed, and the bill was thereupon amended by making the trustee in the liquidation a party to it, and an injunction was asked for in the suit to restrain him from interfering with the testator's estate. At the same time the trustee in the liquidation applied to the Court of bankruptcy for an injunction to restrain the plaintiffs in the suit from taking any further proceedings to realise the partnership debts. The Court of Appeal held that the bankruptcy court was the proper forum for deciding the questions arising between the estates of the testator and the executor, and that an injunction in bankruptcy was granted to restrain the plaintiffs from taking any proceedings against the trustee in that or any other suit, in respect of any property come to his hands (1). An injunction was refused in another case. The facts were: A suit in Chancery was instituted by legatees against the executors of their testator and the continuing partners of a firm of which he had at the time of his death been a member, and another partner who had retired from the firm since the testator's death, for the purpose of winding up the affairs of partnership as they existed at the time of the testator's death, and obtaining payment to his estate of his share of the capital. After the bill was filed, the continuing members of the partnership filed a petition for liquidation, and a trustee was appointed who was made a party to the suit, although no relief was prayed against him. The trustee applied to the court of bankruptcy to restrain the plaintiffs from taking any further proceedings in the suit as against him. Bacon, C. J. affirmed the decision of the judge of the county court who had refused to grant such an injunction, observing that no injury would be done to the trustee, as he was only put in the place of the liquidating debtors to receive any payment to which their estates might be entitled, and the Lords Justices approved of his decision; Mellish, L. J. observing that if there was a *bona fide* suit against a solvent person, as an accounting party, and another person who became bankrupt, it would hardly be right to have the account taken in bankruptcy, because, generally speaking, the solvent party, as being the person who has to pay what is found due, is the person really interested in seeing how the account is taken. The Lords Justices, however, did grant an injunction to restrain the suit from proceeding as against the trustee; because, when the case came on before them, the partner who had retired had also filed a petition for liquidation, and that being so, they held that there was no longer any reason why the account should not be taken in the court of bankruptcy. Under the Presidency-towns Insolvency Act section 18 (1) provides for stay of suits or proceedings pending against the insolvent in other courts by the insolvency court but in the Provincial Insolvency Act there is no section which expressly authorises the insolvency court to stay a proceedings pending in another court, though under section 29, the other court in which the proceedings are pending may make an order of stay. Order 39, Civil Procedure Code, applies to insolvency proceedings, but under that Order a court is not authorised to issue an injunction to one who is not a party. Under the Code of Civil Procedure, it has, however, been held that under section 151, the Court has inherent jurisdiction to issue an injunction against a person who is not a party. It is submitted that under section 4,

(1) *Morley v. White*, L. R. 8 Ch. 214.

- S. 4. and under section 151 Civil Procedure Code, the insolvency court may entertain an application for its decision on title and at the same time it may stay the proceedings pending in another court. Following the English cases, it was assumed by the Sind High Court in a case that the court has such jurisdiction though on the facts it was refused (1).

Procedure and inquiry under the section.—In acting under the section the insolvency court exercises the power of a civil court. The procedure which the court should adopt in trying questions of title should be like a regular suit. It should have all the parties before it, take their pleadings, admit their documents, frame issues and record the evidence of the parties (1). It is to act with the judicial caution of the civil court and the claimants have a right to be heard judicially. A thorough inquiry is necessary and a summary order passed without reference to this section cannot under any circumstances be treated as a proper and valid order (3). The application should be treated like a plaint for purposes of its proper frame in regard to joinder of parties and causes of action (4).

All that is required is that the inquiry should be as thorough as it is in a suit. It does not mean that in all cases proceedings under section 4 should be commenced by a claim or by a regular application because under the section the court can act even *suo moto* (5). Similarly the procedure of the insolvency court in executing its order under section 4 is only analogous to and not identical with that under Order XXI, Civil Procedure Code (6).

Appeals.—Under section 75 where the order is passed by a court subordinate to the district court the first appeal lies to the district court and a second appeal lies to the High Court from the order of the district court passed in appeal on any of the grounds mentioned in sub-section 1 of section 100 of the Code of Civil Procedure 1908. Where it is the district court which passes an order under section 4 in the exercise of its original insolvency jurisdiction, an appeal lies to the High Court as a matter of right under section 75, sub-section 2. The law relating to appeals from orders under section 4, is quite simple and clear but in actual practice difficulty has arisen as to what orders come within the scope of section 4.

Thus it has been held that an order extending time under section 27 (7), an order adjudging a person an insolvent, an order granting the insolvent a conditional discharge (8) and an order avoiding a voluntary transfer under section 53 and 54 (9) do not fall under section 4 as they are specifically provided for in other sections of the Act (10). An order dismissing

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- (1) Official receiver *v.* Zenabai, A. I. R. 1930 Sind 97 : 120 I. C. 513.
 (2) Ghani Mahommed *v.* Dina Nath Puri, 108 I. C. 602 : A. I. R. 1928 Lah. 556 ; Surja *v.* Girindra, 79 I. C. 552 : A. I. R. 1925 Oudh 109.
 (3) Lachhi *v.* Badri Prasad, A. I. R. 1934 Lahore 1003 : 156 I. C. 278.
 (4) Binraj Harnandrai, *In re*, 60 Cal. 1367 : 149 I. C. 995 : A. I. R. 1934 Cal. 232.
 (5) Ghulam Dastgir *v.* Mohan Lal, A. I. R. 1933 Lah. 789 : 146 I. C. 912
 (6) Nachi Muthu Chettiar *v.* Ramakkal, A. I. R. 1933 Mad 475 : 147 I. C. 494.
 (7) Samba Murti Ayyar *v.* Rama Krishna Aiyar, 114 I. C. 847 : 29 M. L. W. 60 : 52 Mad. 337 : A. I. R. 1929 Mad. 43 : 55 M. L. J. 837.
 (8) Allahdiya *v.* Kunj Bihari, I. R. 1932 Lahore 645 (1).
 (9) Gopal Das *v.* Official Receiver, 132 I. C. 526 : A. I. R. 1931 Lah. 647.
 (10) Ram Chander *v.* Ram Chandra, 27 N. L. R. 179 : 134 I. C. 687 : A. I. R. 1931 Nag. 153 ; Alagiri Subbanaick *v.* Official Receiver Tinnevely, 54 Mad. 989 : 132 I. C. 641 : A. I. R. 1931 Mad. 745 : 61 M. L. J. 820.

a claim under section 4 (1) or an order holding that a claim is not maintainable under section 4 (2), or an order purporting to have been made under section 4 (3), are orders under section 4 (3). For fuller treatment commentary under section 75. S. 5.

Limitation under the section.—The statute of limitation is a bar to a motion made under the provisions of this section, such motion being equivalent to an action and if the statute would have been an answer to an action by the bankrupt, it will be an answer to a motion by the trustee (4). When the insolvency court is called upon to exercise jurisdiction under section 4, it would, except under very special circumstances, refuse to exercise that jurisdiction were a suit instituted on the same day as the application made before it, is liable to be defeated by a plea of limitation, *i.e.*, it would not afford relief to the aggrieved party to resort to this section when the enforcement of such relief before an ordinary tribunal is statute-barred (5). In the case last cited the court entertained an application for declaring a mortgage void under section 53, Transfer of Property Act, though a suit in the ordinary court was barred, on the ground that there were special circumstances in the case. If the Sind view is correct, it would mean that the insolvency court has power to entertain and decide questions of title which cannot be agitated or litigated in the ordinary courts of law. It is doubtful if it was the intention of the Legislature that a court acting under section 4 was not bound by the statute of limitation. The above decision is also opposed to English law. The English rule has been followed by the Madras High Court which has held that an application under section 7, Pt. I. A. 1909 is equivalent to a suit for the purpose of section 3, Indian Limitation Act, which applies the articles of the Act to all suits. Thus where an Official Assignee made an application under section 7 to call upon the mortgagee of the insolvent's property for the rents and profits which he had received from the property it held that he could receive rents and profits only for the period of three years immediately preceding his application (6). It is submitted, with respect, that the Sind case was not correctly decided. Section 4 does not enlarge the rights of the receiver, as representing the insolvent's estate against third persons; it has only provided for an other forum or tribunal where those rights can be litigated.

5. (1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts in regard to proceedings under this Act in

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- (1) *Munomohan Roy v. Bhupala Chand Roy*, A. I. R. 1935 Cal. 123. (2) *Venkatarama Chetty v. Angathaya malu*, 146 I. C. 204 : 38 L. W. 896 : A. I. R. 1933 Mad 471.
 (3) *J. N. Mundara v. Nensi Rajpal*, A. I. R. 1935 Nag. 246 : 161 I. C. 981.
 (4) *Re Manson*, 9 Mor. 198.
 (5) *Atma Ram Udhav Das v. Dayaram Sawney*, 115 I. C. 380 : A. I. R. 1929 Sind 94.
 (6) *G. V. Muthu Swami Chetty v. Official Assignee Madras*, A. I. R. 1936 Mad 778.

- S. 5** Courts subordinate to them, shall have the same
(1). powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

History and analogous law.—This section is an exact reproduction of section 47 of the Act III of 1907. Section 90, Clause (1), Presidency-towns Insolvency Act is similarly worded. Under both the Acts, the applicability of Civil Procedure Code is made subject to the special rules of procedure laid down by the Acts themselves.

Scope.—Section 3 mentions the courts which will have jurisdiction in insolvency matters ; section 4 mentions questions, whether of title or priority or of any nature whatsoever which properly form within the scope of an enquiry by the insolvency court for the purpose of doing complete justice or making a complete distribution of property in any such case ; Section 5 lays down the procedure which the insolvency courts should follow in all proceedings under the Act. Apart from section 5, Section 141, Civil Procedure Code makes the provisions of the Code applicable to all matters which may be tried by a civil court in the exercise of its original civil jurisdiction. And it has been held that proceedings in insolvency are in the nature of a suit and that section 141 applies.

Applicability.—The following provisions of the Code of Civil Procedure have been considered in relation to the applicability of section 5 to insolvency proceedings :—

(1) Under the Old Act there was difference of opinion as to section 21 Civil Procedure Code applied to insolvency proceedings. It was held that the section did not apply (1). This defect has now been cured in the new Act by the enactment of section 11 which has been taken almost word by word from Civil Procedure Code.

(2) Section 11, Civil Procedure Code.—Section 11, Civil Procedure Code by its wording applies to suits only. The doctrine of *res-judicata* on which the section is based, is, however, very much wider. It is based on the rule that once a matter has been finally decided between the parties it shall not be re-agitated and decided again in any other proceeding between the parties. On general principles the doctrine of *res-judicata* has, therefore, been applied to insolvency proceedings. Where the Official Receiver filed a petition under sections 4 and 54 of the Act to set aside an execution sale as “fraudulent preference” and where the Court dismissed the petition after a trial on the merits holding that there was no fraudulent preference and that section 4 did not apply, a second application by a creditor for the same relief was barred (2).

Order 9 Civil Procedure Code; appearance of parties and consequences of non-appearance.—It has been held that on principles, similar to Order 9, the insolvency court can entertain an application for setting aside an *ex-parte* order of adjudication under Order 9, rule 13, Civil Procedure Code (3). Similarly where the first application for insolvency was dismissed

(1) Madho Pershad v Walton, 18 C. W. N. 1050.

(2) Rangappa v. Rangappa, 140 I. C. 461 : A. I. R. 1933 Mad. 9 : 56 Mad. 395.

(3) Bhagwan Das v. Chumi Lal, Official Receiver, A. I. R. 1930 Lah 993 : 121 I. C. 303.

Order 9 rule 2 a second application was held competent under Order 9 rule 4(1). Where the second application under Order 9 rule 4 for the restoration of the first application was also dismissed in default, a fresh application on the same facts can be entertained (2). An application for setting aside an order annulling adjudication by the Official Receiver or a creditor is competent under Order 9 rule 13 and Order 47 rule 1, Civil Procedure Code (2).

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(1).

There is no provision in the Act for the setting aside of an order of adjudication of an insolvent passed *ex parte*. An application for setting aside such an order has to be made under O. 9 rule 13 Civil Procedure Code and is governed by Act 164 of the Limitation Act (4).

Order 42 Rule 1 and Section 14 Civil Procedure Code Review of orders.—Where a sale has been set aside *ex parte* against the transferee in insolvency proceedings he can be given an opportunity to prove his case if sufficient cause for his non-appearance is shown (5). The general body of creditors should not be allowed to suffer by the *bona fide* mistake of the Official Receiver in allowing an order of discharge to be passed *ex parte*. That is a sufficient cause for the court to review or set aside its own order (6). Where an application for restoration of a case is dismissed for default and not considered on the merits because there has been a compromise, there was an error on the face of the record and the court can correct it (7).

A court can always undo the injustice likely to result from its *ex parte* order when no innocent third party had acquired any rights (8).

Under the Presidency-towns Insolvency Act section 8 (1) gives the court unlimited power to review, rescind or vary any order made by it in its insolvency jurisdiction. In the absence of any such provision in the Provincial Act, it is necessary that, before the court can review alter, or set aside its own order, that the power so exercised should have been conferred on it by some provision of the Civil Procedure Code (9).

Order 21 ; Execution of decrees and orders.—A Division Bench of the Allahabad High Court, in a case arising under the old Act, decided that where the highest bidder at the auction of an insolvent's property sold by the receiver fails to deposit the one fourth amount of the purchase money and the property is thereafter sold at a loss the receiver cannot realize the loss from the bidder under Order 21 rule 71, Civil Procedure Code on the ground that section 47 (5) does not operate so as to confer upon a District Judge all powers or to impose upon him all the duties in

(1) Chouth Mal Bhagirath v. Khem Korandas, A. I. R. 1928 Patna 116; Yerravenkatagiri v. Maddipatta, A. I. R. 1927 Madras 579 : 101 I. C. 349 (a).

(2) Abdul Aziz v. Mistri, 49 I. C. 229.

(3) Ayyaswami Chetty v. The Official Receiver Coimbatore, A. I. R. 1932 Mad 68 : 135 I. C. 750.

(4) Umarkdown v. Raghunath Sahai, 138 I. C. 377 : 33 P. L. R. 698 : A. I. R. 1932 Lahore 523.

(5) Govinda Ram v. Official Receiver of Trichnapoly, A. I. R. 1927 Mad. 897 : 103 I. C. 381.

(6) Ayyaswami Chetty v. Official Receiver Coimbatore, 135 I. C. 750 : A. I. R. 1932 Mad. 63 : Radha Vallabh v. Awachit, A. I. R. 1933 Nag. 39 : 141 I. C. 48.

(7) Badhavallabh v. Awachit, 141 I. C. 48 : A. I. R. 1933 Nag. 39.

(8) Ishardas v. Mst. Fatima Bibi, 15 Lahore 698 : 153 I. C. 993 : A. I. R. 1934 Lahore 468.

(9) See in this connection Sher Singh v. Firm Bishan Lal Suraj Bhan, A. I. R. 1937 Lahore 568 (O. 47 R. 7 C. P. C. held inapplicable to an insolvency) and Firm Nanak Ram Moti Lal v. Jugal Kishore Marwari, A. I. R. 1935 Pat. 177, where O. 47 R. 7 was applied.

S. 5 connection with the sale of an insolvent's property by a receiver which are
(1). provided by Order 21 by C.P.C. in connection with the execution of decrees of civil courts. In the words of Piggott J. :—

"If the court or the receiver, acting under the order of the court, is not bound to follow all the procedure laid down by Order 21, Civil Procedure Code including the necessity for attaching the property sought to be realised, for issuing a proclamation of sale, for hearing objections preferred as to ownership of the property or the like, neither can it be held that the court becomes invested with special powers such as those conferred upon an execution court by Order 21 rule 71 of the Civil Procedure Code (1). This case was distinguished and to some extent dissented from in a Nagpur case (2). An attachment of property under section 13 (3) of the Act of 1907 (now section 21) is analogous to an attachment before judgment under the Civil Procedure Code and the insolvency court is bound to enquire into petitions of objections purporting to be filed under Order 21 rule 58, Civil Procedure Code (3).

Section 144, Civil Procedure Code relating to restitution.—

Where the receiver had in pursuance of an order of court paid off some of the assets to the creditors, the court has the power under section 144, Civil Procedure Code, on the reversal of that order by the High Court, to direct the creditors to refund the amount (4).

Schedule 2 relating to arbitration in suits.—It is inapplicable to insolvency proceedings (5). Rattigan J. made the following important observations :—"Proceedings under the Act are of a peculiar character and it is only district courts and courts specially empowered by the Local Government, with the previous sanction of the Governor-General in Council, that are given jurisdiction to deal with cases under the Act (Section 3), and it would be anomalous if a Court, to which a petition is presented, could delegate the whole of its functions under the Act to a person or persons possessing no special qualifications for dealing with those questions of an intricate and peculiar nature that usually arise in such proceedings and ought in the ordinary course of things to be decided by a judicial officer of experience. An officer who occupies the position of a district judge is to be assumed to have this experience, but it is significant that no court other than a district court is to have jurisdiction under the Act unless it has been specially invested with powers under the Act by the Local Government and that even in these cases the previous sanction of the Governor-General in Council is a condition precedent. In *Simla Bank v. Narpat Rai* (6) (a case which was decided under the Punjab Laws Act, 1872), Sir Meredyth Plowden expressed the opinion that the provisions of Chapter 37 of the Civil Procedure Code, which dealt with references to arbitration, are not applicable from the very nature of the proceedings "to a proceeding in insolvency as between the creditors on the one side and the insolvent on the other, and I have no hesitation in adding that the provisions of Schedule II of the Civil Procedure Code now in force are equally inapplicable to proceedings under Act III of 1907. These proceedings require the exercise of judicial discretion and it would, I consider, be acting contrary to the whole spirit of the Act for a Court,

(1) *Cheda Lal v. Lachman Parshad*, 39 All. 267 : A. I. R. 1917 All. 74 : 37 I. C. 830.

(2) *Manak Chand v. Ibrahim*, A. I. R. 1921 Nag. 25 : 17 N. L. R. 49 : 62 I. C. 307.

(3) *Hasmat Bibi v. Bhagwan Dass*, 36 All. 65 : 24 I. C. 752 : 1914 All. 264.

(4) *Panna Lal Sham Lal v. Abdulla*, 1932 A. L. J. 1095 : 148 I. C. 330 : A. I. R. 1933 All. 117.

(5) *Ladha Singh v. Bhag Singh*, A. I. R. 1916 Lah. 170.

which has special jurisdiction thereunder, to delegate its powers and duties to an arbitrator."

S. 5
(1).

Order 1 relating to joinder of parties and causes of action applies to petitions presented under the Act.

The proper test to be applied where a petition for insolvency is made against more than one debtor or it is made by more than one debtor or creditor is to treat the petition as a suit. If the suit is bad for multifariousness, having regard to the provisions of Order 1 Civil Procedure Code, the court should order that there should be separate petitions and if it is free from these defects, the court should try it (1). For full notes see commentary under Sections 7, 9 & 10.

Order 6 rule 17, Civil Procedure Code relating to the amendment of pleadings is applicable to petitions under the Insolvency Act. Where the words "with intent to defeat and delay his creditors" were omitted but the act of insolvency was clearly set out, it was held that there being a formal defect arising from the omission of certain words an amendment by including these words should be allowed (2). The same amendment was however, not, allowed in A. I. R. 1934 Ran. 87, on the ground that an omission to make the allegation that the act complained of was committed with intent to defeat or delay the creditors of the alleged debtors cannot be regarded merely as a formal defect but must be treated as a failure to mention an essential ingredient of the act of insolvency. The principle that amendment can be allowed in a fit case was, however, assumed and conceded. The general rule is that leave to amend will be granted so as to enable the real question in issue to be raised, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs or other terms to be imposed by the order (3). The rule in its special application to a petition for insolvency was stated by Page, C. J. in the following terms :—

"When the amendment that is sought is one that does not affect the substance of the petition, but merely will have the effect of bringing the petition in conformity with the rules of practice or remedying a formal defect, the court in its discretion might properly grant leave for the amendment to be made, even if the amended petition would necessarily be presented more than three months after the alleged act of insolvency, provided that no hardship would thereby be worked to the respondents. But where the amendment is one that goes to the root of the petition and alters the substance of the act of insolvency alleged, the court ought not to permit the amendment to be made, if the effect of so doing would be that the amended petition should be re-presented more than three months after the date of the act of insolvency alleged."

Under Order 22 Civil Procedure Code, the court has power to bring on the record of the insolvency proceeding the name of the legal representatives of the deceased insolvent (4) and it is incumbent upon the court to permit the representative of the insolvent to take part in the proceedings (5).

(1) *Kalu Ram v. Gitwar Chand*, A. I. R. 1930 Lah. 592.

(2) *Srirangan Chettiar v. Sornam Pillau*, A. I. R. 1935 Mad. 202 : 67 M. L. J. 924.

(3) *Weldon v. Neal* (1897) 1 Q.B.D. 394 ;

(4) *Ramjas v. Katha Singh*, A. I. R. 1921 Lah. 331 (2) : 59 I. C. 51.

(5) *Siri Pat Singh v. Maharajah Sir Prodyat Kumar Tagore*, 57 I. C. 810 : A. I. R. 1921 Cal 219 : 48 Cal 87.

S. 5
(1).

Order 39—An Insolvency Court is justified in granting an injunction to prevent a creditor who claims a lien over some of the debtor's assets, and which is disputed by other creditors, from bringing the property to sale, pending the decision of the suit between the two creditors (1).

Similarly it has the power to restrain a secured creditor from selling the goods after adjudication (2). The power to issue an injunction can be exercised to stay a pending litigation (3).

Section 151, Civil Procedure Code confers upon a civil court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court. This power, by virtue of section 5, is possessed by the insolvency court as well (4). No hard and fast rule can be laid down as to when and under what circumstances this should be exercised; that have to be decided according to the peculiar facts of each case (5). Where an insolvency court, while passing an order under section 43 annulling adjudication, has omitted to pass an order under section 37 directing that the property of the insolvent shall vest in the Official Receiver for the benefit of the general body of creditors, it has the power to add it at a latter stage (6). Prior to the pronouncement of Their Lordships of the Privy Council in Chhatrapat Singh's case (7), it was held in some cases (8) that the insolvency court has inherent power to dismiss an insolvency petition, whether presented by a debtor or creditor, if it has been presented not with the *bona fide* intention of obtaining an adjudication, but for an inequitable or collateral purpose.

The Privy Council case was decided under the old Act but Their Lordships' reasoning will apply with equal force to a case arising under the present Act. Sir Lawrence Jenkins in delivering judgment remarked as follows:—

"The dismissal of Chhatrapat's petition by the district court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed the appeal; no other reason is indicated. It is to be regretted that the courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles the debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right: and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a

(1) *Hajee Ally Mahomed v M. M. Bham*, 111 I. C. 908 : 6 Rang. 352 : A. I. R. 1928 Rang. 241.

(2) *Luxmi Industrial Bank Ltd., v. Dinesh Chandra Roy*, 55 Cal. 1053 : 113 I. C. 105 : A. I. R. 1928 Cal. 609.

(3) *Ram Sundar Rai v. Ram Dhain Ram*, 3 P. L. J. 456 : 46 I. C. 224.

(4) *Ishar Das v. Mst. Fatima Bibi*, 153 I. C. 993 : A. I. R. 1934 Lahore 468.

(5) *Ishar Das v. Mst. Fatima Bibi*, 15 Lah. 698 : A. I. R. 1934 Lah. 468 : 153 I. C. 993.

(6) A. I. R. 1934 Lah. 468 *Supra*; *Chouth Mal Bhagirath v. Jokhi Ram Suraj Mal*, A. I. R. 1933 Patna 84 : 12 Pat. 163 : 141 I. C. 836.

(7) *Chattarpat Singh Dugar v. Kharag Singh Lachmi Ram*, A. I. R. 1916 Privy Council 64 : 44 I. A. 11 : 44 Cal. 535 : 39 I. C. 788.

(8) *Girwadhari v. Jai Narain*, 32 All. 645; *Samiruddin v. Kudumoya*, 15 C.W. N. 224; *Dropdi v. Hira Lal*, 34 All. 496 : 16 I. C. 149; *Hasmat Bibi v. Bhagwan Das*, 36 All. 65 : A. I. R. 1914 All. 264 : 24 I. C. 752.

ground of decision as an "abuse of the process of the Court. This case illustrates the peril of the doctrine in India, for what has been treated by the courts below as such an abuse appears to their Lordships in no way to merit this censure." Indian Courts frequently resort to section 151 to give effect to so called moral or equitable considerations and in doing it fail to follow the express provisions of the Legislature. This case should serve as a warning that section 151 should be invoked in very exceptional circumstances, and that where the legislature has in clear and distinct terms given directions of its own, the use of section 151 cannot be defended. The Court is competent to pass an order staying the insolvency proceedings on the exercise of its inherent jurisdiction on the analogy of somewhat similar provisions contained in section 94, P-t. I. A. (1).

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(2).

(b) Whether the Insolvency Court has inherent jurisdiction to grant an *interim* protection order to a debtor before he is actually arrested? For full notes see section 23.

Section 148 C. P. C.—There is a considerable difference of opinion on the point as to whether the Insolvency Court can extend time fixed by section 43 sub-section (1). For full notes see commentary under section 43.

Application of the general provisions of the Indian Limitation Act to the Act.—See full notes under section 78 and section 9.

Sub-section 2—Powers of District Courts and High Court. Subsection 1 deals with the powers and procedure of the court having original insolvency jurisdiction. Sub-section 2 rules that the powers and procedure of High Courts and district courts in regard to proceedings under this Act in courts subordinate to them shall be the same which they have and follow in regard to civil suits. Section 75 of the Act, however, specifically deals with appeals and revision. For powers of the High Courts and district courts in appeal and revision refer to commentary under section 75. The powers of these courts in review are, however, governed by the general provisions of Civil Procedure Code. They can review their own orders only if the conditions of Order 47 Rule 1 (2), Civil Procedure Code are satisfied and they can entertain an appeal from an order of a court subordinate to them on an application for review made to the latter court only if the case falls within the ambit of Order 47 rule 7, Civil Procedure Code.

Powers of the High Court in the original and appellate jurisdiction; Section 18 (A), Presidency-Towns Insolvency Act.—Before the enactment of section 18 (A) cases arose when concurrent insolvency proceedings were pending before the High Court as well as a district court. Obviously there was great inconvenience in such cases. The question was sought to be solved in two ways. (a) The proceedings in High Court might be transferred to a District Court. This was answered in the negative in *Gokal Das Jamna Das v. Sadasiviar* (3), (b) the proceedings in the District Court might be stayed or transferred to the High Court in its original jurisdiction, this too was decided in the negative. (4)

(1) 190 I. C. 559 : A. I. R. 1931 Sind 65.

(2) *Munna Lal v. Kunj Bhari*, A. I. R. 1922 All. 206 : 40 All. 605 : 67 I. C. 376.

(3) *Goculdass Jumnadass & Co. v. N. M. Sadasiviar*, 52 Mad. 57 : 28 M. L. W. 369 : 114 I. C. 352 : A. I. R. 1928 Mad. 1091.

(4) *Sassoon and Sons v. Gosto Behari*, 31 C. W. N. 841 : A. I. R. 1927 Cal. 629 : 103 I. C. 754 ; *Sarat Chandar Pal v. Barlow and Co.*, 33 C. W. N. 15 (F. B.) : 48 C. L. J. 298.

- S. 6. In this state of affairs the intervention of the Legislature became necessary, and Act 10 of 1930 was passed to add section 18 (A) with a view to give the original side of the High Court powers over District Courts in insolvency matters.

Power of the Insolvency Court to deliver possession of property to purchaser from the Receiver.—See commentary under sections 4 & 56.

Appeals to Privy Council.—The leading case is a decision of the Privy Council itself. It is remarked that when a right of appeal is given to one of the ordinary courts of the country, the procedure, orders and decrees of that court will be governed by the ordinary rules of the Civil Procedure Code and that an appeal to the Privy Council is therefore maintainable from the decision of the High Court under section 75 from the order of the district judge under section 4 sub-section (1) (1). Even before that, a Division Bench of the Calcutta High Court had ruled that by the provisions of sections 46 and 47 of the Provincial Insolvency Act, 1907, (sections 75 and 5 of the present Act), it was not intended to interfere with any right of appeal to the Privy Council that might otherwise exist. It was also held that the right of appeal from the High Court to the Privy Council rests on clause 39 of the Letters Patent of 1865 read with sections 101 and 110 and Order XLV rule 3, Civil Procedure Code. In an insolvency matter, original or appellate, an application for leave to appeal lies under Clause 39 of the Letters Patent even if no such application lies under section 109, Civil Procedure Code (2). When leave to appeal is granted reasons for the decision should always be recorded (3). The Privy Council ruling was followed in A. I. R. 1934 Rang. 292 (4). There it was also held that having regard to section 110, Civil Procedure Code, leave to appeal should be granted only if the applicant in appeal from the order in insolvency suffers a loss of Rs. 10,000 or upwards and that the value of the whole property involved is immaterial.

Subject to the provisions of the Act.—Section 5 is to be read subject to section 10, clause (2). Section 10 sub-section (2) provides a definite remedy for a debtor in respect of whom an order of adjudication has been annulled under section 43 and it is not open to the Insolvency Court to set aside its order by virtue of the provisions of Order 9 of Civil Procedure Code (5).

PART II.

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of Insolvency.

6. A debtor commits an act of insolvency in each of the following cases, namely:—

(a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property

(1) Maung Ba Ihaw : Ma Pir, 148 I. C. 1 : 12 Rang. 194 : 61 I. A. 158. A.L.R. 1934 P. C. 81.

(2) Annamali Chetty v. Official Assignee, A. I. R. 1925 Mad. 243 : 91 I. C. 126.

(3) Alagirisubba Naick v. The Official Receiver of Tinnevely, 54 Mad. 989 : A. I. R. 1931 Mad. 745 : 132 I. C. 641.

(4) N. C. Galliard v. A. M. M. Murugappa Chetty, A. I. R. 1934 Rang. 292 : 12 Rang. 355.

(5) Venugopala Chariar v. Chinna Lal, 49 M.L. 935 : 97 I. C. 706 : A. I. R. 1926 Mad. 942.

to a third person for the benefit of his creditors generally ; S.6.

- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;
- (c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;
- (d) if, with intent to defeat or delay his creditors—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;
- (e) if any of his property has been sold in execution of the decree of any court for the payment of money ;
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act ;
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts ; or
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section the act of an agent may be the act of the principal.

Origin of acts of insolvency.—The earliest specification in English Statute Law of acts of bankruptcy is to be found in 13 Eliz. c. 7, and this has been added to and varied by subsequent statutes. A transfer for the benefit of the creditors generally, though it was not expressly mentioned in the Bankruptcy Acts, prior to the Act of 1869, was always treated as an act of bankruptcy. It was first expressly mentioned as an act of bankruptcy by the Bankruptcy Act, 1869, section 1, subsection 2. The act of insolvency mentioned in clause (b) was first introduced by 1 Jac. I. c. 15. section 2. Transfer by way of fraudulent preference was first introduced into the Statute Book by the Bankruptcy Act, 1883, (section 4 c.) though it was always treated as such from a very early period.

S. 6. Some of the acts mentioned in clause (d) were introduced by the Statute 34 & 35 Hen. 8. c. 4, and the others by the Statute 13 Eliz. c. 7. The act of bankruptcy mentioned in clause (g) first appeared in the Bankruptcy Act, 1883. Imprisonment was first made an act of bankruptcy by one Jac. I. and it was included in subsequent Bankruptcy Acts, the period of imprisonment varying in the different Statutes. The last Bankruptcy Act in which it appeared was that of 1849, and the term of imprisonment necessary to constitute it an act of bankruptcy was two months. Then came the Debtors Act, 1869, by which imprisonment for debt, except in a few cases was abolished, and lying in prison ceased to be an act of bankruptcy under the Bankruptcy Law of England. In India lying in prison was declared by the Indian Insolvency Act, 1848, to be an act of insolvency, in the case of non-traders by section 8, and in the case of traders by section 9 of the Act, the term of imprisonment necessary to constitute an act of insolvency being 21 days. No term of imprisonment is now specified in the Presidency towns or the Provincial Acts.

Analogous Law.—The acts of bankruptcy are defined in section 1 of the British Bankruptcy Act, 1914, as amended by the Act of 1926. It runs as follows.—

(1) A debtor commits an act of bankruptcy in each of the following cases :—

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally ;

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof ;

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt ;

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house ;

(e) If execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceedings in the High Court and the goods have been either sold or held by the sheriff for twenty-one days.

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, shall not be taken into account in calculating such period of twenty-one days.

(f) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself ;

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Clause (g) and sub-section (2) of section 1, B. A., 1934, have been omitted from the above quotation. Clause (g) deals with bankruptcy notices, non-compliance with which gives a creditor a right to present a

petition. The Indian Acts have no provisions similar to it. Sub-section 2 contains the definition of a debtor. Before the Act of 1914 it was held in some cases that the English Courts had no jurisdiction to adjudicate a domiciled foreigner carrying on business in England through an agent. The present definition enlarges the scope and number of persons who can now be adjudicated insolvent. Now by clauses (c) and (d) of the present sub-section a person carrying on business in England by means of an agent or a manager, or a person, who is a member of a firm or partnership which carries on business in England, is liable to adjudication by the English Courts. See in this connection commentary under section 6 and section 9, where the difference between the Indian and English Law is pointed out and the matter is considered at length.

S. 6.

The corresponding section of the Presidency-towns Insolvency Act is section 9, which is substantially the same as the present section with this difference that an attachment for a period of twenty-one days in execution of the decree of any court for the payment of money is an act of insolvency under that Act but it is not so under the Provincial Insolvency Act.

The present section substantially reproduces section 4 of the Act 3 of 1907.

Object.—One of the chief aims of every system of bankruptcy law is to effect the distribution of the property of the debtor in the most expeditious, the most equal, and the most economical mode. In order to achieve this purpose it is necessary that as soon as a person becomes insolvent his affairs should be brought under the control of the insolvency court. As to when such a state of affairs is to be deemed for the State to step in and protect the interests of the creditors, the Legislature has prescribed certain acts as indicia of insolvency. The commission of an act of insolvency by a debtor is the very foundation of insolvency jurisdiction.

In a general sense insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of the court, to stop individual action by creditors. And to secure administration of the debtor's estate in the general interest of creditors the law also generally allows the debtor to apply to have the same administration. The justification for such proceedings by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law (1).

Section should be strictly construed.—As remarked before, the insolvency court can intervene in the affairs of a debtor only when the latter has committed an act of insolvency. An act of bankruptcy does not exist apart from the statute. They are the creation of statute and there is no such act except that which the statute declares to be one (2). They entail disabilities on the person who commits them. They should be construed as strictly as if they occurred in a section which defines a misdemeanour (3). Bacon, C. J. observed in *Ex parte Coates. In re Skelton* (4): "It is the very gist and essence of the bankruptcy Act that creditors who

(1) Attorney General of British Columbia v. Attorney General of Canada, A. I. R. 1937 P. C. 95.

(2) Anupana Debi v. Gurudas Chatterji, 57 Cal. 1274 : 131 I. C. 1990 : A. I. R. 1931 Cal. 246.

(3) Dulomal Variomaland v. Sumar Khan, A. I. R. 1928 Sind 79 : 120 I. C. 517.

S. 6, claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act (1).

Acts of insolvency should be clearly and fully specified in the insolvency petition.—Adjudication of a debtor as insolvent at the instance of the creditors involves considerable disgrace and legal disabilities and, therefore, it is very necessary that the act of insolvency alleged to have been committed by him should be clearly and precisely described in the insolvency petition to enable the debtor to meet the charge brought against him (1), and, unless the facts alleged bring the debtor's conduct well within the ambit of the statute, the court should stay its hands both in the matter of adjudication and the appointment of a Receiver (2). Thus in *A. I. R. 1934 Rangoon 87*, the applicant was not allowed to amend the petition by adding the allegation that the act complained of was committed with intent to defeat or delay the creditors on the ground that the omission must be treated as a failure to allege an essential ingredient.

A person cannot be adjudicated an insolvent at the instance of his creditors for an act of insolvency not relied on in the application against him (3). It is not enough that it is stated in the verifying affidavit, as it cannot be considered as part of the petition (4). Where, therefore, an application is presented by a creditor for getting the debtor adjudged insolvent, the mere mention by the petitioner that a warrant of arrest had been issued against the debtor during insolvency proceedings does not justify the court in taking notice of it and making it the basis of its order of adjudication when it is not mentioned in the application and is an event which happened subsequently (5). Where the petition makes allegations consisting of an incomprehensible mixture of clauses (b) and (c) of section 6, it should be dismissed on the ground of absence of sufficient precision alone (6).

Strict proof of act of insolvency necessary.—Not only the section should be strictly construed and that the act of insolvency relied upon and alleged should be clearly and fully specified in the petition but also the court should insist that the act of insolvency is proved beyond all doubt (7). Strict proof is, however not necessary where the insolvent himself gives evidence saying that he is unable to pay the debts and where the situation is as if he is himself the petitioner (8). Nor the act of insolvency need be stated verbatim in the words of the section; it will

(1) *Krishnadas Roy v. Charnsila Pal Chaudhury*, 137 I. C. 31 : A. I. R. 1932 Cal 290.

(2) *Harkishan Lal v. Peoples Bank of Northern India, Ltd.*, A. I. R. 1932 Lah. 643 (2) : 140 I. C. 275 : 14 Lah. 117.

(3) (*Pedda*) *Kodnappa v. (Ganne) Pullappa*, A. I. R. 1929 Mad. 910 (1) : 119 I. C. 46.

(4) *Narotam Das Shiv Lal v. Firm Parshotam B. Panchal*, A. I. R. 1937 Rang. 53 ; C. A. P. C. S. Chettyar v. V. V. R. Chettyar, 13 Rang. 686 : 159 I. C. 1055 : A. I. R. 1935 Rang. 352.

(5) *Ganga Dhar v. Sher Khan*, A. I. R. 1935 Pesh. 168 : 159 I. C. 529.

(6) *Ko. Shwe So v. R. M. V. E. R. Chettyar*, A. I. R. 1937 Rang. 189.

(7) *Bavajer Chetty v. Bawa Ranga Swami Chetty*, 12 I. C. 618 ; In re Adamali Mahomedli Nulwala, A. I. R. 1932 Bom. 580 : 141 I. C. 657 ; S. A. R. M. Chettyar firm, In the matter of, 149 I. C. 1036 : A. I. R. 1933 Rang. 280 ; C. A. P. C. S. Chettyar v. V. V. R. Chettyar, 13 Rang. 686 : 159 I. C. 1055 : A. I. R. 1935 Rang. 352.

(8) *Periya Karuppan v. Angappa Chettiar*, 21 M. L. W. 52 : A. I. R. 1925 Mad. 483 : 86 I. C. 229.

be enough if the petition and affidavit read together sufficiently disclose the meaning of the section. Omission to state the fact that the petitioner is a secured creditor and to value his security is a defect curable by amendment of the petition. In the absence of a subsisting order of adjudication the petitioner might be allowed to amend the petition within three months of the act of insolvency (1). The scope of enquiry for proving an act of insolvency depends upon the circumstances. Where one of the several creditors made an application to have the debtor declared insolvent, the debtor appeared and made a certain statement, which went to prove that he had committed an act of insolvency. No other proof was given and the debtor was declared insolvent; it was held, that the statement made by the debtor was ample proof of the act of insolvency and the right of the creditor to file the application (2).

S. 6
(a)

Transfer.—As defined in section 5 of the Transfer of Property Act, 1882, “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act. The word, “transfer” is used here in its widest sense and extends to and includes the various methods of dealing with property to which conveyancers usually have recourse, having regard to the nature of the subject-matter (3).

Transfer for benefit of creditors generally.—In the English Act, the words, “conveyance or assignment” are used. They are technical words but they have been interpreted in a wide sense by giving them their ordinary meaning. The reason for treating such a transfer as an act of insolvency is that the transferor thereby deprives himself of the power of carrying on his trade, and endeavours to put his property into a course of distribution among his creditors different from that which should take place under the bankruptcy law and without the safeguards which that law provides (4).

In order that a transfer may be an act of insolvency under this clause it is necessary that the following conditions should be satisfied :—

(a) The transfer must be for the benefit of all the creditors, and not a particular class of creditors. Thus a transfer by a debtor for the benefit of his trade creditors only does not fall under the clause (5). A composition-deed whereby the debtor transfers his property to trustees for the benefit of such of his creditors as may sign it within a specified period is a transfer for the benefit of the creditors generally.

(b) The transfer must be of all or substantially all his property. A transfer of a portion of the debtor's property is not enough. The reason is that by transferring all or substantially all his property the debtor puts it out of his power to deal with it.

(c) The transfer must be in the favour of a third person. A mere declaration of trust by the debtor, or a mere agreement by him that his

(1) *Mahomed Ayyab Sahib v. G. P. Gunnis*, 13 M. L. T. 275 : (1913) M. W. N. 264 : 19 I. C. 19 : 24 M. L. J. 562.

(2) *Chaini Ram v. Hannu*, 18 I. C. 729.

(3) See *Re Hughes*, (1893) 1 Q. B. 595.

(4) *Re Spackman*, (1890) 24 Q. B. D. 728, 738; *Re Wood*, (1872) L. R. 7 Ch. App. 302; *In the matter of Brij Mohan Dobay*, (1897) 2 C. W. N. 30.

(a) *Re Phillips* (1900) 2 O. R. 329. And see *Re Sharp*, 83 L. T. 216.

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property shall be dealt with for the benefit of his creditors (1), or a mere letter by the debtor to a third person authorising him to realise his property and hold the proceeds for the benefit of his creditors (2) do not come within the clause.

Under the clause it is not necessary to prove an intent to defeat or delay creditors as it is in clause (b); such a transfer has always been deemed in itself to have that effect, wholly independent of what was the intention (3).

In British India or elsewhere.—These words show that an act of insolvency can be committed even if the transfer is executed out of British India. But the transfer must be intended to operate according to Indian Law, *i. e.*, a conveyance executed by a British Indian subject domiciled in British India, although out of British India, may be an act of bankruptcy, but a conveyance executed by a domiciled foreigner in his own country, which must necessarily operate according to the foreign law cannot (4). It is also necessary that the property, the subject of transfer should be situate in British India, as property situate abroad cannot be made available for distribution.

Clause (b); Transfer with intent to defeat or delay his creditors.—Under the preceding clause we have seen that a transfer of all or substantially all his property to a third person for the benefit of his creditors generally by a debtor is an act of insolvency on which a petition for insolvency can be founded. The present clause deals with a different kind of transfers. The object underlying the first clause is that no debtor shall be allowed to substitute a different course of distribution of his property amongst his creditors from that prescribed by the insolvency law. The object of the present clause is that no one shall be allowed to remove or take away his property from being made available for distribution in the case of insolvency amongst his creditors. The property so transferred may consist of the whole assets of the debtor or a part thereof only. Under the first clause a transfer of all his assets is necessary. Again, the transfer under the present clause may not be for the benefit of his creditors generally, as it is in the first clause. As a matter of fact clause (b) contemplates transfers against the interests of the creditors as a whole or any one of them.

The present clause should also be distinguished from clause (c). At one time in England a very clear distinction between the classes of transfers falling under the present clause and clause (c) was not always brought out. But now there as well as here in India the Acts make a well-marked distinction between them. A transfer to come under clause (c) must be in favour of a creditor, but a transfer under clause (b) may or may not be in favour of such a person; it may be in favour of a third person. Again, the object of a transfer to fall under clause (c) should be to prefer one creditor to another. Such an object is not necessary in order that a transfer should fall under clause (b). Under the latter clause, what makes the transfer an act of insolvency is an intent to defeat or delay his creditors.

(1) *Re Spackman*, (1890) 2 Q. B. D. 1728.

(2) *Lipton v. Bell*, (1924) 1 K. B. 701.

(3) *Re Wood*, L. R. 7 Ch. 302.

(4) *Ex parte Crispin*, (1873) L. R. 8 Ch. 374; *Cooke v. Charles A. Vogeler Co.*, (1901) A. C. 102.

Again, the transfers which are voidable by the insolvency laws should be distinguished from transfers which are voidable at the instance of creditors under the general law. The most important provision of the general law is to be found in section 53, Transfer of Property Act in India and section 172 of the Law of Property Act, 1925, in England. Under both these sections transfers of property made with intent to defeat or delay creditors have been rendered voidable at the instance of creditors. There is a proviso in those sections for the protection of purchasers in good faith and for consideration. The scope of clause (b) of the present section and section 53, Transfer of Property Act, is not always the same, though these two provisions overlap. By way of illustration it may be stated that a transfer in favour of a creditor for a pre-existing debt is not voidable under section 53, T.P.A. even though it may be made with intention to defeat an anticipated execution of another creditor, and it cannot be avoided under section 53, Transfer of Property Act. The reason is that section 53 contemplates the interest of creditors as a whole or in a body and not the interests of particular creditors. Clause (b), it is submitted, embraces even those transfers where the transfer is made with intent to defeat or delay any one or more than one creditors. Still cases decided under section 53, Transfer of Property Act are a useful guide in interpreting the present clause. S. 6 (b).

With intent to defeat or delay his creditors.—The central condition to make a transfer of property an act of insolvency under this clause is that the transfer must have been made by the debtor with intent to defeat or delay his creditors. Unless that intent can be found as a matter of fact or as a matter of presumption of law, the clause has no application. The corresponding provision of the Bankruptcy Act of 1914, is contained in section 1, clause (b), in the following words :—

“If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.”

The above sub-section has appeared in substance in every bankruptcy Act since 6 Geo ; IV, c. 16. Prior to that Act the words “With intent to defeat and delay his creditors” appeared in the definition of this act of bankruptcy. The alteration in the law was thus explained by Mellish, L. J., in *re Wood* (1):—

“The word ‘fraudulent’ meant fraudulent as against creditors ; that the conveyance, having to be fraudulent against creditors, it must be with intent to defraud creditors and the words ‘with intent to defraud creditors’ were, therefore, to be implied. There was no difference between a conveyance fraudulent as against creditors and a conveyance with intent to defeat or delay creditors except that in the former case the intent is not a matter of fact but a conclusion of law ; and that the words ‘with intent to defeat or delay creditors’ were left out in the Act of 1869, as superfluous and misleading.

The only difference between the English law as it stands and the Indian law appears to be that an assignment of a debtor’s whole property for a past debt will be fraudulent under English law as a matter of law, whereas under the Indian law such an assignment need not necessarily be considered as fraudulent with the aid of an immutable presumption of law, but in actual practice such an assignment may be presumed to be an act of insolvency unless it is shown not to be so.

On a reading of the Indian section, it is, therefore, clear that the main question for the consideration of the court is to find out whether a

- S. 6** particular transfer is made with intent to defeat or delay his creditors.
(b) This question is a question of fact and depends upon the circumstances of each case (1). The burden of proving this intent is on the person who relies upon the transfer as an act of insolvency (3). It is true that the initial onus lies upon the creditors but this burden is light or heavy according to circumstances and in many cases the court will make it only a matter of inference from surrounding circumstances.

Like any other question of fact the proof of an intention to defeat or delay creditors depends upon a number of other facts, such as the extent to which the property has been transferred, the consideration for the transfer, the financial position of the debtor at the time of the transfer and so on. The most important facts which deserve special treatment are the extent of property covered by the transfer and the nature and extent of consideration for the transfer. Different considerations arise if the debtor has transferred the whole of his property and when he has transferred only a portion thereof. Similarly it will make a great difference whether the consideration for the transfer consists of a past debt, a pre-existing debt and a present advance, a present advance only, a pre-existing debt and future advance or a present or future advance only. We proceed to consider these matters in the following paragraphs.

Assignment of the whole of a debtor's property.—Where the debtor assigns the whole of his property for the benefit of one creditor, or several, to the exclusion of others the necessary consequence of such an assignment is to defraud the excluded creditors (3). This was held to be fraudulent even if a transaction was entered into honestly (4). At present, however, the law does not stand in the same unqualified manner as it has been stated in the early English cases (5). Now, the fraudulent nature of an assignment of the whole of the debtor's property depends upon the circumstances of each case and there is no irrebuttable presumption of law making them fraudulent by the mere fact that the assignment comprises the whole property of a debtor.

(a) Where the assignment is for a past debt or pre-existing liability only.—Where the assignment is made for a past debt the assignment is fraudulent, whatever the motive of the parties may be (6). In such a case the question of intention is not a matter of fact but something which is to be inferred as a matter of law. It is unnecessary that either the intent or actual cause should be found as matters of fact. The fraudulent intention of the debtor is assumed as a matter of law. The Indian cases, however, seem to be not in accordance with the English Law inasmuch as in some of them it has been held that it would not be safe to infer that every transfer of the whole of the debtor's property is of necessity fraudulent and that whether it was or was not done with such an intention is a matter of fact which is not the subject of any immutable presumption of law but is a fact to be inferred from circumstances of each particular case (7). The English case of *re Wood* (8) was followed in a Bombay

(1) *Jetha Nand Murij Mal v. Ghanshamdas*, A.I.R. 1935 Sind 53 : 159 I. C. 745.

(2) *Ko Po Yin v. Daw Hnin Thet*, A. I. R. 1934 Rang. 242 : 153 I. C. 146.

(3) *Worsley v. De Mattos*, 1 Burr. 467; *Re Wood*, L. R. 7 Ch. 302.

(4) *Re Sharp*, 83 L.T. 416.

(5) *Rose v. Haycock*, 1 A. & E. 460; *Baxter v. Pritchard*, 1 A. & E. 456; *I see v. Hart* 11. Ex. 880.

(6) *Re Wood*, L. R. 7 Ch. 302., *Exp. Ellis*, 2 Ch. D. 797.

(7) *Jetha Nand Murij Mal v. Ghanshamdas*, A. I. R. 1935 Sind 53 : 159. I.; C. 745. See also *Ganga Dhar v. Sher Khan*, A. I. R. 1935 Fesh. 163 : 159 I. C. 529.

(8) 1872, 7 Ch. App. 302.

case where it was held that a sale or mortgage by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of insolvency, whatever the motives of the parties may have been; as such a transfer has the effect of withdrawing all the debtor's property from the legal process which his creditors have a right to enforce against him, and it necessarily defeats or delays the other creditors of the debtor by preventing them from issuing executions. Thus there appears to be some difference amongst the Indian High Courts. The difference may not be material in actual practice but its existence in theory cannot be denied. From the history of the English Legislation and its interpretation made by Mellish, L. J., in the well-known case of *re Wood*, *supra* shows that the Indian Law is different from the English Law as it stands now inasmuch as here the question of intention is always a question of fact, just as it was under the Act of 1849. where the words "with intent to defeat and delay his creditors" appeared.

S (b)

(b) **Where the assignment is for a pre-existing debt and a present or future advance.**—At one time in England it was considered that if the consideration for the assignment were wholly or partly an antecedent debt contracted without security such an assignment was an act of bankruptcy, even though the object of the assignment might have been to secure a present, or present and future advance (1). Now it is, however well settled in England that an assignment, partly in consideration of an existing debt and partly as a security for a further advance is not necessarily and as a conclusion of law an act of bankruptcy (2). The reason why a substantial present advance operates to prevent an assignment of the whole of the debtor's property from being an act of bankruptcy is that it is deemed equivalent to such a substantial exception of a part of a debtor's property from the assignment as would save that assignment from covering the whole of the debtor's property and from being as such an act of bankruptcy (3).

The present consideration need not be in a cash payment (4). It may consist of the release of the debtor's property from a charge already affecting it (5), or it may be a sum paid to another creditor to release a previous charge on the property (6). Payment by the transferee to some creditors, though honestly made, is not a sufficient equivalent (7) nor an agreement by him with the debtor to pay creditors (8). Forbearance to seize under an execution or a bill of sale will not prevent a subsequent bill of sale over the whole of the debtor's property to secure an antecedent debt without any present advance from being an act of bankruptcy (9). Merely giving time to a debtor to pay is not a sufficient consideration to

(1) *Graham v. Chapman*, 21 L. J. C. P. 173; *Bittlestone v. Cooke*, 6 E. and B. 296; *Hutton v. Cruttwell*, 21 L. J. Q. B., 78.

(2) *Pennell v. Reynolds*, 11 C. D. N. S. 709; *Mercer v. Peterson*, L. R. 3 Ex. 104; *Lomax v. Buxton*, L. R. 6 C. P. 107; See also *Kevan v. Mawson*, 24 L. T. 394; *Exp. Fetherher*, L. R. 7 Ch. 636.

(3) See *Lomax v. Buxton*, L. R. 6 C. P. 107.

(4) *Ex parte Threlfall*, 1876, 46 L. J. Bk. 8. "Further supply of goods to debtor"; *Exp. Reed*, 1872, L. R. 14 Eq. 582 (Retiring bills upon which debtor was liable).

(5) *Whitmore v. Claridge*, 1863, 33 L. J. Q. B. 87.

(6) *Lomax v. Buxton*, 1871, L. R. 6 C. P. 107.

(7) *Re Sharp*, 1900, 83 L. T. 416.

(8) *Ex parte Chaplin*, 1884, 26 Ch. D. 319.

(9) *Woodhouse v. Murray*, L. R. 4 Q. B. 27.; *Exp. Cooper*, 10 Ch. D. 313; *Exp. Payne* 11 Ch. D. 513.

- S. 6 prevent a transfer of the whole of a debtor's property from being an act of insolvency (1).
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Test. In the cases of assignment of the debtor's whole property for a pre-existing debt and a present advance the true test for determining whether or no such mortgage or assignment is an act of bankruptcy is this: "Was the intention of the lender to enable the debtor to continue his business or was the whole transaction a mere device for obtaining payment of or security for an antecedent debt (2). Thus it has been held that where a trader in difficulties secretly assigned substantially the whole of his property, the real consideration being the release by the assignees of a past debt and a verbal agreement by him to pay the assignor's debt, the assignment was an act of bankruptcy (3). Where a trader, who was liable under a judgment, transferred his business to a limited company of which he was the chairman, managing director and secretary, holding substantially all the shares and with power to draw cheques and complete control, it was held that the transfer was an act of bankruptcy, and that the trustee's title prevailed over that of creditors for the company (4). Where a transfer to a company is set aside as an act of bankruptcy to which the trustee's title relates and the business of the company has meanwhile been carried on by the receiver for the debenture-holders, the receiver is liable as a trespasser to account to the trustee for the assets, if any, which may have come into his hands or for the value of them (5). For cases decided under 13 Eliz. c. 5 (Section 172 Law of Property Act 1925) see the undermentioned note (6).

If the advance is made *bona fide* for the purpose of enabling the debtor to continue his business the mere fact that the advance is not proportional to the property charged or is not equal to the existing debt will not make the assignment an act of bankruptcy (7). The law has been thus summarised: "The result of the authorities is, that where a debtor assigns his whole property as security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the amount of the advance is great or small, but whether there was a *bona fide* intention of carrying on the business" (8). If the advance was made by the lender with the intention of enabling the borrower to continue his business and if he had reasonable grounds for believing that it would do so, then the assignment is not an act of bankruptcy and the court will not regard any uncommunicated intention of the grantor, nor the actual result of the loan (9). The amount of the advance is certainly not the test, but that the bill of sale contemplates further advances after its execution and that such advances are made to a substantial amount is strong evidence of *bona fides* (10). If the amount of simultaneous and future advance is very

(1) *Exp. Cooper*, 1878, 10 Ch. D. 313.

(2) *Exp. Johnson*, 26 Ch. D. 338; *Exp. King*, 2 Ch. D. 256. *Exp. Threlfall*, 46 L. J. Bank 8; *Exp. Greener*, 6 L. J. Bank 76; *Exp. Wilkinson*, 22 Ch. D. 788; *Administrator-General of Jamaica v. Lascelles De Mercado & Coy.*, 1894, A. C. 135.

(3) *Exp. Chaplin*, 26 Ch. D. 319.

(4) *Re Hirth*, 1899, 1 Q. B. 612.

(5) *Re Goldburg No. 2*, 1912, 1 K. B. 606.

(6) *Re Goldburg*, 1912, 1 K. B. 384; *Re Fasey*, 1923, 2 Ch. 1; *Re Lloyd Furniture Palace Ltd.*, 1925, Ch. 853.

(7) *Exp. Threlfall*, 46 L. J. Bk. 8; *Exp. Evans*, 39 L. T. 364; *Hutton v. Cruttwell*, 22 L. J. Q. B. 78; *Bittlestone v. Cooke*, 6 E. & B. 296.

(8) *Exp. Ellis*, 2 Ch. D. 797, per Mellish, L. J.

(9) *Exp. Johnson*, 26 Ch. D. 338; *Administrator-General of Jamaica v. Lascelles De Mercado & Coy.*, 1894, A. C. 135.

(10) *Exp. King*, 2 Ch. D. 226.

large as compared with the amount of the pre-existing debt the occasion for applying the test mentioned above hardly arises. In a Privy Council case the simultaneous advance was nearly as much as the pre-existing debt and the undertaking to give future advances was for considerably more. It was argued for the assignee that the proper test is, whether it was the intention of the parties that the debts giving such a security should carry on his business. In repelling this contention it was remarked debtor "Their Lordships conceive that question hardly arises except in those cases where the amount of additional assistance given at the time of the mortgage is so small as to create a doubt whether it is substantial; and then comes in the inquiry into the motives of the parties, whether they did really intend that the business should be carried on or not. It is impossible to raise such a question here, where the amount of simultaneous and future advance is very large." (1).

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Assignment of after-acquired property. It was once held that if the assignment included future-acquired property the assignment was an act of bankruptcy (2). In subsequent cases it has, however, been held that the mere fact of after-acquired property being included does not render the assignment an act of bankruptcy (3). The old view relying on *Graham v. Chapman*, was followed in a Calcutta case (4). The subsequent English decision of the Court of appeal in *Ex parte Hauxwell supra* was not brought to the notice of the learned court. The Calcutta decision, it is submitted with respect, is wrong.

Present advance intended to pay off existing debt. The mere fact that the present advance is, to the knowledge of the person making the advance intended to pay off an existing secured (5), or unsecured (6) debt, and thereby to relieve the debtor's estate from a liability to a distress or any other charge does not prevent such an advance from saving the assignment from being an act of bankruptcy. Where a debtor sold goods intending, to the knowledge of the purchaser, to use the purchase money in making a voluntary payment to a third person, it was held¹ that the sale was not fraudulent (7).

Assignment and advance must be contemporaneous : Exception.

The general rule is that the advance and the assignment in order to prevent the assignment from being an act of bankruptcy must be contemporaneous; but a sum of money advanced upon the faith of an unconditional promise to give a bill of sale will be treated as an advance made in consideration of the bill of sale (8). Where a document is set up which, upon the face of it, is an act of bankruptcy, *i. e.*, an assignment of all of a man's goods for a past consideration, if it is said that it is not an act of bankruptcy, because it is warranted by prior agreement, the *onus*

(1) *Khoo Kwat Siew v. Wooi Taik Hwat*, 19 Cal. 223. (See this case generally on the whole subject under consideration).

(2) *Graham v. Chapman*, 12 C. B. 85.

(3) *Exp. Hauxwell*, 23 Ch. D. 626; See also *Kevan v. Mawson*, 24 L. T. 394 and *Lomax v. Buxton*, L. R. 6 C. P. 107, where *Graham v. Chapman supra* was doubted.

(4) In the matter of *Ambrose Summers*, 1896, 23 Cal. 592.

(5) *Whitmore v. Claridge*, 31 L. J. Q. B. 87.

(6) *Exp. Reed*, L. R. 14 Eq. 582; See also *Exp. Zwilchenbart*, 3 I. D. & B. 671.

(7) *Exp. Stubbins*, 17 Ch. D. 58.

(8) *Harris v. Rickett*, 4 H. & N. 1; *Hutton v. Cruttwell*, 22 L. J. Q. B. 78; *Mercer v. Paterson*, L. R. 3. Ex.; 104 *Exp. Izard*, L. R. 9 Ch. 271; *Exp. King*, 2 Ch. D. 256.

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probandi is always on the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bona fide* agreement (1). It is the duty of the court to satisfy itself that the agreement was made *bona fide* in the sense that there was no express or secret bargain or understanding that the giving of the bill of sale or assignment should be delayed until the creditor had reached the state of insolvency and there should always be a clear explanation of the delay in completing the transaction (2). Where the prior agreement contemplates a postponing of the execution of the bill of sale, *i. e.*, where he promises to give a bill of sale, when required, this, if unexplained, shows an intention to prefer the grantee in the event of bankruptcy and the bill of sale is void (3). The postponement of taking possession under a sale-deed void for want of registration, will not, at all events where there is no agreement to postpone or to refrain from registering at the instance and for the benefit of the bankrupt, make the transaction an act of bankruptcy (4). In another case a bill of sale given by agreement in renewal of a former bill of sale, given to secure a then present advance but agreed not to be registered, was upheld (5).

Assignment for a present advance only. Where the assignment of the debtor's whole property is made for a present advance, the motive of obtaining advance is a material circumstance. If the effect of the assignment would be to stop the debtor's trade, notwithstanding the advance, the court will infer an intent to defeat and delay creditors and hold the assignment void (6). The assignment may be in the form of a sale. Such a transaction amounts merely to a conversion of goods into money (7). The test for such assignments is the same as for those where the consideration is partly a pre-existing debt and a present advance. The only difference which appears to be is that where the consideration is partly a pre-existing debt, the court will look much more closely into the circumstances, the reason being, no doubt, the suggestion of fraudulent preference which at once arises; but on the other hand when the security does not include any pre-existing debt, many circumstances, such as exorbitant interest, which would otherwise throw suspicion upon the transaction, will not avail to defeat the assignment (8).

Assignment in consideration of future advances.—Where the advance is future, in order that the execution of a bill of sale of substantially the whole of the grantor's property as securing a pre-existing debt and further advances may not be an act of bankruptcy, it is necessary that

(1) *Exp. Kilner*, 13 Ch. D. 245; *Veluswami Thevar*, In the matter of, 13 Rang. 192; 149. I. C. 217; A. I. R. 1935 Rang. 345.

(2) *Veluswami Thevar*, in the matter of, A. I. R. 1935 Rang. 343; *Exp. Fisher*, L. R. Ch. 636.

(3) *Exp. Bolland*, 8 Ch. 230; *Exp. Burton*, 13 Ch. D. 102; *Re Jackson & Bassford, Ltd.*, 1906, 2 Ch. 467. See also *Exp. Izard*, L. R. 9 Ch. 271, *Exp. King*, 2 Ch. D. 256 & *Exp. Hauxwell*, 23 Ch. D. 626, where the Court considered the explanation sufficient and the bill of sale valid, although its execution was postponed.

(4) *Morris v. Morris*, 1895, A. C. 625.

(5) *Re Jackson*, 4 Ch. D. 682; See also *Exp. Foxley*, L.R. 3 Ch. App. 515, which decided to the contrary on similar facts.

(6) *Harrison v. Cohen*, 32 L. T. 717.

(7) *Rose v. Haycock*, 1834, 1 Ad. & Ell. 460; *Baxter v. Pritchard*, 1834, 1 Ad. & Ell. 456; *Lee v. Hart*, 1865, 11 Exch. 880.

(8) *Harrison v. Cohen*, 32 L. T. 717; *Heath v. Cochrane*, 37 L. T. 280.

there should be a *bona fide* agreement by the grantee to make further advances (1). Such an agreement need not be legally binding (2).

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Here also as it is in the case of a present advance the intention of the parties is a material circumstance. An assignment in consideration of future advances alone or in consideration of pre-existing debt and future advances will not be saved from being an act of bankruptcy unless the object of the future advance was to enable the debtor to continue his business. If there was such an intention and if the lender had reasonable grounds for believing that it would do so, the assignment is not an act of bankruptcy, and the court will not regard any uncommunicated intention of the grantor, nor the actual result of the loan (3).

What is whole of debtor's property.—As already indicated, different considerations arise when the transfer is only for a part of the debtor's property and does not comprise his whole estate. It becomes therefore very important to determine as to whether a transfer by the debtor comprises his all or substantially his all property or not. The court has got to see in each case as to whether the exception of a part of a debtor's property is a real or colourable one. Colourable exceptions of a part of debtor's property will not save an assignment which substantially covers the whole of his property from being an act of bankruptcy (4). Similarly the exception of any property, however large in amount, of the debtor, which could not be taken in execution and would not pass to the trustee, will not save the assignment (5).

The true test as to whether such a transaction is colourable or not is: Will the assignment, if acted on, notwithstanding the exception, produce insolvency or prevent the debtor from carrying on his business? (6) In the case of non-traders the test will be as to whether the assignment, notwithstanding the exception, must tend to defeat and delay creditors who are not paid by the assignment. The burden of proving that the transfer is calculated to delay creditors or to stop business lies upon the person who sets up the transfer as an act of insolvency (7).

In determining the value of the property excepted from the transfer, book debts are to be taken into account (8).

Transfer of a part of the debtor's property.—If a debtor transfers only a portion of his property in consideration of a past debt, the transfer does not by itself amount to an act of insolvency, unless it is made with the intent to defeat or delay his creditors and that intent must be proved. It may even be inferred from surrounding circumstances. Such a transfer cannot constitute an act of insolvency by itself in the absence of evidence of such intention, because it is competent to a trader

(1) *Exp. Winder*, 1 Ch. D. 290; S. C. On Appeal, *Sub-Nom Exp. Sheen*, 1 Ch. D. 560; *Exp. Dann*, 17 Ch. D. 26.

(2) *Exp. Wilkins*, 22 Ch. D. 788; See *Re Davies*, 1921, 3 K. B. 628.

(3) *Exp. Johnson*, 26 Ch. D. 338; Administrator-General of Jamaica v. Lascelles De Mercado & Coy, 1894, A. C. 135. See also *Exp. Hill*, 23 Ch. D. 695.

(4) *Worsley v. De Mattos*, 1 Burr. 467; *Hale v. Allnut*, 25 L. J. C. P. 267; *Smith v. Timms*, 32 L. J. Exch. 215; *Pennele v. Dawson*, 18 C. B. 355; *Pennell v. Reynolds*, 11 C. D. N. S. 709.

(5) *Exp. Hawker*, L. R. 7 Ch. 214.

(6) *Young v. Waud*, 8 Ex. 221; *Leake v. Young*, 5 E. & B. 955; *Exp. Bland*, 6 De G. N. and G. 757; *Young v. Fletcher*, 34 L. J. Ex. 164; *Smith v. Cannan*, 2 E. and B. 35; *Exp. Bailey*, 22 L. J. Bk. 45.

(7) *Wedge v. Newlyn*, 1833, 4 B. and Ad. 831; 110 E. R. 668.

(8) *Exp. Burton*, 13 Ch. D. 1026; *Exp. Field*, 13 Ch. D. 106. The case of *Exp. Foxley*, L. R. 3 Ch. 515, if an authority to the contrary, is not good law.

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to appropriate specific portions of his property in payment of or by way of security for particular debts. So also a transfer of a part only of a debtor's property in consideration of present advance is not by itself an act of insolvency (1). Where even after the alienation of his certain properties the remaining assets of a debtor still exceed the total value of the debts, the debtor cannot be declared insolvent on the ground that he is unable to pay his debts and the alienation effected by him cannot amount to an act of insolvency (2).

Similarly where an insolvent makes a gift of a small portion of his property under a registered-deed of gift more than two years before the adjudication and the property of the insolvent was worth a great deal more on the date of gift and most of the debts in insolvency were incurred after that date, the gift cannot be deemed to have been made fraudulently with the object of defeating creditors (3). Similarly it has been held that where a transfer of a part of the assets to satisfy pre-existing debts still leaves sufficient assets in the hands of the debtor to enable him to meet his other engagements, such a transfer does not constitute an act of insolvency as it cannot be said of the transfer that it was made with intent to defeat or delay creditors (4). The consideration for a transaction alleged to be fraudulent was Rs. 48,000 and the present advance was only Rs. 439, the rest was all to be paid to creditors. This was executed on the 25th October 1921 and the petition for adjudication was filed on 24th January 1922. The transferee was a near relation of the debtor who was in embarrassed circumstances at the time, it was held that the transaction was a fraudulent one and there was an available act of bankruptcy for the creditor to apply under the Act (5).

As regards the fraudulent intention of the grantor there is this distinction between the assignment of the whole and the assignment of a part of the property for a past consideration, that in the former his fraudulent intention is assumed as a matter of law whereas in the latter it must be proved as a matter of fact (6).

A transfer of a part of a debtor's property in favour of the creditors may fall under the sub-clause and it may also fall under the next clause and may be avoided as a fraudulent transfer.

Transfers within the meaning of the clause.—The creation of a document by a debtor purporting to transfer his property to another, with intention of putting the property nominally in the name of that other, retaining the beneficial interest in the debtor himself, would amount to an act of insolvency, if done with the intention of delaying or defeating the creditors. Such a transfer is not nominal in the sense that there was no intention to give any effect to it. A deed of transfer, however, which evidences a sham transaction, which the parties had no intention whatsoever to give effect to, and which does not affect the property or any interest in it, is a mere nullity and does not constitute an act of

(1) Adam Ali Mahomad Ali Nulwala, *in re*, A. I. R. 1932 Bom. 580 : 14 I. C. 657.

(2) Muni Lal v. Hira Lal, A. I. R. 1933 Lah. 582 : 150 I. C. 651.

(3) Mst. Jamna Devi v. Official Receiver Campbellpore, A. I. R. 1936 Lah. 593 : 163 I. C. 956.

(4) P. N. Chettyar Firm v. A. K. A. C. T. A. L. Chettyar firm, A. I. R. 1936 Rang. 129 : 162 I. C. 115.

(5) Rama Thai Anni v. Kannippa, 110 I. C. 167 : 51 Mad. 495 : A. I. R. 1928 Mad. 480.

(6) William's Bankruptcy Practice, 14th Edition, p. 15.

insolvency within the meaning of the section (1). A collusive suit brought by the debtor and its subsequent withdrawal or compromise of the same with the object of putting another party in possession of immovable property may amount to a transfer of property by the insolvent within the meaning of section 4 (b) of the Act (2). To constitute a fraudulent delivery or transfer, it must convey an interest to the person to whom the goods are transferred (3). S. 6
(c) (d).

Voluntary partition of the joint family estate by a father governed by the Mithakshara Law who is a debtor with himself and his minor sons, without making adequate provision for settlement of his debts, amounts to transfer of his property with intent to delay and defeat his creditors (4).

Clause (c). Fraudulent preference.—This clause refers to section 54 of the Act which declares certain transfers and transactions void against the official receiver as fraudulent preferences. For the doctrine of fraudulent preference and as to what constitutes such preference, see commentary under section 54.

Clause (d). With intent to defeat or delay creditors. These words override the whole clause (5). All the acts mentioned here are in themselves innocent, but they become acts of insolvency if done with that intention. It is immaterial that no creditor has in fact been delayed (6). As to whether any one of these acts was committed with intent to defeat or delay creditors is a matter of fact. It must be proved as such; the debtor's intention can be inferred from surrounding circumstances. It is often a matter of inference and the inference is to be drawn by not taking each fact singly but by taking their cumulative effect (7). It is not a matter of law resulting from the act of the debtor. It would appear that if the act was not committed with that intention the fact that the necessary consequence of the debtor's act would be to defeat or delay certain creditors will not make it an act of insolvency. It also appears that the English cases (8) are not applicable under the Indian Act. In *Holroyd's* case the court went so far as to say that when a debtor knew that the necessary consequence of his going abroad would be to defeat or delay certain creditors, he goes with intent to defeat or delay his creditors, even though his going abroad had nothing to do with the debts. The intent should be alleged specifically in the petition (9). An omission of an allegation can be rectified by amendment before adjudication (10). In that case the amended petition should be served on the debtor (11).

Clause (d) (i). Under section 6 (d) of the act it is an essential feature of an act of insolvency that the act should be done with intent to defeat or delay the creditors generally of the debtor. It is not enough to allege or to prove

(1) *The Secretary of State for India v. Dadi Reddinagiah*, A. I. R. 1919 M. 467; 55 I. C. 593.

(2) *Puran Nath v. Atwargi*, A. I. R. 1915 All. 225; 29 I. C. 217.

(3) *Isitt v. Beeston*, L. R. Ex. 159; *Cole v. Davies*, Ld. Raymond, 724.

(4) *Bajirao v. Danlatrao*, A. I. R. 1930 Nag. 215.

(5) *Re Wood*, L. R. 7 Ch. App. 302.

(6) *William v. Nunn*, (1809) 1 Taunt. 270; 127 E. R. 837; *Fowler v. Padget*, 7 T. R. 509; *Rouch v. G. W. R. Co.*, 1 Q. B. 51.

(7) *Sulaman Hajee Mohamad v. Hajee Ahmad Hajee Essak*, A. I. R. 1937 Rang 16.

(8) *Exp. Goater*, 30 L. T. 610; *Re Brayant*, 3 M. and A. 722, and this even though his going abroad had nothing to do with his debts. *Holroyd v. Whitehead* 3 Camp. 530.

(9) *Ex parte Coates*, (1877) 5 Ch. D. 979; 36 L. T. 806; *Abu Haji v. Haji Jan*, (1906) 3 Bombay L. R. 648.

(10) *Re Fiddian*, *Ex parte Fiddian*, (1892) 9 Mor. 65.

(11) *Re Fiddian*, *Squire and Co.*, (1892) 66 L. T. 208.

- S. 6 that the act was done with intent to defeat or delay any particular creditor.
- (d) An attempt by a debtor to deprive any one creditor of the fruits of a decree against him is not an act of insolvency (1). If the debtors, who have been carrying at one time a fairly extensive business close their place of business, leave the locality in an unaccountable manner and take residence within the territories of a Native State, there is a clear indication of an intention to defeat or delay creditors within the meaning of section 6 (d) P. I. A. (2).

Departing out of British India. A person, with intent to defeat or delay his creditors, may depart out of British India, or he may remain there if he has already gone out. In both the cases he commits an act of insolvency. In the first case the act of insolvency is complete on the moment of departure and is not affected by subsequent circumstances (3). The fact that he returned, having altered his intention, is immaterial (4). If a trader leaves British India without making any provision for the payment of his bills, it will be presumed that his intention was to delay his creditors (5), but it may not be so if the debtor's permanent residence is outside British India (6). Where a married woman trader leaves her place of business without paying her creditors, or notifying her change of address, she commits an act of insolvency, though at her husband's request, she goes to live with him elsewhere (7).

Remaining out of British India. The words "remains out of British India" imply that the person who remains out of British India has his home or place of business in British India, and cannot reasonably be held to apply to the case of a foreigner who leaves British India for his own home and remains in his home (8). The same principle applies in the case of a domiciled British subject whose permanent residence is out of British India (9). Remaining out of British India is a continuing act of insolvency (10).

Clause (d) (ii) The fact of the debtor having departed from his dwelling house or place of business in itself connotes nothing. The essential ingredient of the act of insolvency is that the act was committed by the debtor with intent to defeat or delay his creditors (11). Whether that intention exists is a question of fact (12). In 21 Bom. 297 (13). The facts were: A debtor in Bombay summoned his creditors to a meeting fixed for the 28th March, 1896. He attended the meeting, which was adjourned to the 30th March, and at the adjourned meeting he submitted a statement

(1) *Maung Myun Zin v. Saw Ens Hoke*, 158 I. C. 610 : A.I.R. 1935 Rang 281; *People's Bank of Northern India Lahore v. Seth Yusaf Ali Ismail*, A. I. R. 1937 Lahore 495.

(2) *Muni Lall v. The Bari Doab Bank, Ltd. of Hoshiarpur*, 161 I. C. 151 : A.I.R. 1936 Lahore 176.

(3) *Ex parte Gardner*, (1812) 1 Ves. and B. 45.

(4) *Dholan and others*, an application by, All India reporter 1919 Sind. 1 : 56 I. C. 158 : 13 S. L. R. 187.

(5) *Ex parte Kilner*, (1837) 2 Dea. 324.

(6) *Ex parte Brandon*, (1884) 25 Ch. D. 500.

(7) *Worseley, in re.* (1901) 1 K. B. 309.

(8) *Ex parte Crispin*, (1873) L. R. 8 Ch. App. 374, 380.

(9) Same as (6).

(10) *Re Alderson*, (1895) 1 Q. B. 183, 186.

(11) *A. M. M. Murugappa Chettyar v. N. C. Galliara* 12 Rang. 150 : A. I. R. 1934 Rang 87 : 151 I. C. 190.

(12) *Ex parte Meyers*, (1872) L. R. 7. Ch. App. 188, 190.

(13) *Re Aranvayal Sabhapaty*, (1897) 21 Bombay 297.

showing that he had a sum of Rs. 11,000 in cash in his hands. Two of his creditors asked him to give inspection of his Bombay books of accounts, but he refused to do so. A further meeting was summoned for the 8th April. On the 31st March or 1st April two of his Bombay creditors served him with a summons in an action of debt. On the 6th April he left Bombay for Bellary taking the said sum of Rs. 11,000 with him, in order (as he admitted) to prevent the said two creditors from attaching it. The creditors attended the meeting of 8th April but it was dissolved when it was discovered that A had left Bombay. The books were not produced. On these facts it was held that A had left the jurisdiction of the court with intent to defeat and delay his creditors within the meaning of section 9 of Indian Insolvency Act (section 6 clause *d* (ii) of the present Act). If a trader shuts up his shop during business hours, or departs from his dwelling house, without leaving instructions as to where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors (1). No such presumption, however, arises where the debtor has left a representative behind (2), or has left direction that letters are to be addressed to him at particular place (3). A departure to avoid an arrest, though under a groundless misapprehension is an act of insolvency (4). In cases of departure, length of absence is immaterial if the intent be proved, as the act of insolvency is complete at the time of departure (5). The debtor's intention is material and therefore he may go abroad for the purpose of his business without committing an act of bankruptcy, if he does so with an honest intention and though as a fact creditors are delayed (6); but mere concealing of property to defeat creditors is not an act of insolvency (7). A mere absence of the debtor from his village for two or three hours when a *munim* of his creditor's shop went to him for collecting the debt or the fact that the debtor was purchasing cloth from a creditor and using the proceeds to pay off the other creditors or the fact that he was not keeping his accounts for about a month and that he had ceased to do his business with vigour are not acts of insolvency (8).

"Otherwise absents himself,"—These words seem intended to cover cases which are not expressly specified in clause (d) of the section (9). The words mean absenting himself from his place of abode for the time being, though it may not be his dwelling house, or from his place of business, or from some particular creditor at some other place (10). Concealing oneself in the backroom of a house to avoid arrest (11), or to withdraw from that part of the house where he usually sits to a more

(1) *Ex parte Austen*, (1837) 2 Dea 533; *Holroyd v. Whitehead*, (1815), 2 Rose. 145; *Re Mekeand*, (1889) 6 Morr. 240; *Re Worsley*, (1901) 1 K. B. 309.
(2) *Re Woolstenholme*, (1887) 4 Morr. 258; *Ex parte Addison*, (1846) 3 DeG. and S. 580: 64 E. R. 615.

(3) *Ex parte Addison*, (1840) 3 DeG. and S. 580: 64 E. R. 615.

(4) *Warner v. Barber*, (1816) Holt. N. P. 175; *Newman v. Sketch*, (1829) Mos. and M. 338; *Spencer v. Billing*, (1812) 1 Rose 362

(5) *Ex parte Gardner*, (1812) 1 Ves. and B. 45; *Bayley v. Schofield*, (1813) 1 M. and S. 388: 105 E. R. 127.

(6) *Warner v. Barber*, 1816 Holt. N. P. 175.

(7) *Harbans Lal v. Bute Khan*, 146 I. C. 628 (1): A. I. R. 1933 Lah. 725 (1).

(8) *Durga ram v. Harkishen*, 88, I. C. 440: A. I. R. 1925 A. 564.

(9) *Mulla*, P. 91.

(10) *Bernasconi v. Farebrother*, (1830) 10 B. and C. 549: 109 E. R. 555; *Holroyd v. Gwynne*, (1809) 2 Taunt. 176: 127 E. R. 1044.

(11) *Chenoweth v. Hay*, (1813) 1 M. and S. 676: 105 E. R. 252.

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(d)

retired part is beginning to keep house (1). In order to prove absenting, it is not necessary to show actual physical absence from a particular place. Absenting may equally be carried out by change of the debtor's name or the name of his house (2). The mere failure of the debtor to keep an appointment with a creditor is not an act of insolvency unless it is accompanied with intent to defeat or delay. Thus where a debtor promised to call at an appointed time on a creditor and pay the money, and having failed to procure the money, he did not call but he was to be found at his own place of business, it was held that there was no act of insolvency (3). If, however, a debtor absents himself from a place at which he has appointed to meet his creditors with reference to a settlement of their demands, with intent to defeat or delay them, it is an act of insolvency, although the place at which the appointment was made was not the debtor's usual place of business (4). Absenting oneself with intent to defeat or delay is a continuing act of insolvency (5).

Clause (d) (iii). Secludes himself.—This is called in English law "beginning to keep house." If a debtor gives a general order to be denied to creditors or others, and a creditor is in consequence denied, it will constitute an act of insolvency (6). The denial must be connected with the order to deny (7), and must be to a creditor or his duly authorised agent (8). If the order to be denied to creditors is not followed by actual denial to a creditor, it seems there is no act of insolvency (9). In ordinary course of business a debtor should be accessible to his creditors. It is not necessary that he should expressly deny access to creditors in order to commit this act of insolvency. If he does conduct himself in a manner as to make himself inaccessible to his creditors he commits an act of insolvency, subject, of course, to the condition that it was committed with an intent to defeat and delay his creditors. Again, accessibility should be such as one would expect from the debtor in ordinary course.

If the creditor calls at an unreasonable hour as for instance at 11 O'clock at night (10), or when the debtor is sick in bed the latter can deny to meet without committing an act of insolvency.

Avoidance of service of writ or process.—Where two debtors began to keep house to avoid service of a writ, with the object of gaining time, and so obtaining an advance to pay off their creditors, it was held that they had kept house with intent to delay, and committed an act of bankruptcy (11). Similarly, where it was alleged that a warrant for the arrest of the judgment-debtor had been issued and that the debtor was concealing himself in order to avoid arrest, it was held that the case

(1) *Key v. Shaw*, 8 Bing. 320

(2) *Re Alderson*, (1895) 1 Q. B. 183.

(3) *Ex parte Meyer*, (1872) L. R. 7 Ch. App. 188.

(4) *Russel v. Bell*, (1842) 10 M. and W. 340 : 152 E. R. 500.

(5) *Re Alderson*, (1895) 1 Q. B. 183.

(6) *Llyod v. Heatcote*, (1820) 2 B. and B. 388.

(7) *Ex parte Foster*, (1810) 17 Ves. 414 : 34 E. R. 160.

(8) *Ex parte Bamford*, (1809) 15 Ves. 449 : 33 E. R. 824.

(9) *Fisher v. Boucher*, (1830) 10 B. and C. 705 : 109 E. R. 612.

(10) *Ex parte Hall*, (1753) 1 Atk. 202 : 26 E. R. 130 ; *Smith v. Currie*, (1813) 3 Camp. 349 : 170 E. R. 1407.

(11) *Richardson v. Pratt*, 52 L. T. 614.

fell within section 6 (d) (iii) (1). A contrary view appears to have been taken in A. I. R. 1935 Rang. 281 (2). In that case the petitioning creditor had experienced some trouble in serving processes against the debtors. It was argued for the creditor that the debtors secluded themselves so that he was unable to communicate with them in order to enforce payment of his decree. In repelling this argument the learned judges remarked:—"Under section 6 (d) of the act, it is an essential feature of an act of insolvency that the act should be done with the intent to defeat or delay the creditors generally of the debtor. It is insufficient to allege or to prove that the act was done with intent to defeat or delay any particular creditor. In these cases all that has been alleged by the respondent (the petitioning creditor) is an intention on the part of the appellants (debtors) to defeat or delay the payment in execution of his decree, and an attempt by a debtor to deprive any one creditor of the fruits of a decree against him is not an act of insolvency. Avoidance of service in connection with one particular execution proceeding is not an act of insolvency."

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(e).

Clause (e) ; "Sold."—If property of a debtor is put up for sale, but not actually sold, that does not constitute an act of insolvency (3).

Acts of bankruptcy are of three kinds ; namely, those which arise from dealings by the debtor with his property ; those which consist of personal acts or defaults committed by him ; and those which arise from the condition of his affairs showing him to be an insolvent (4). Where the act of insolvency is the debtor's own act, it dates from the time when it is begun ; where the act of insolvency is not the act of the insolvent, it dates from the moment after the completion of the act. Thus a transfer for the benefit of creditors generally is an act of insolvency of the debtor's own, and the act dates from the time when it is begun, and it is void as against the Official Assignee as from the moment of its commencement. On the other hand, the act of insolvency now under consideration, not being an act of the debtor, dates from the time when it is complete, that is, from the moment after the completion of the sale. As the sale constitutes an act of insolvency only from the moment after its completion, it is not void as against the Official Assignee as is a transfer for the benefit of the creditors (5). A property is sold as soon as the sale is complete ; which means the date of sale and not the date of confirmation of sale. A petition for insolvency, therefore must be made within three months of the date of sale (6). Attachment of property is not an act of insolvency under the Act. Under the Presidency-towns Insolvency Act, attachment of the debtor's property for a period of not less than 21 days in execution of the decree of any court for the payment of money is an act of insolvency. Attachment has not been made an act of insolvency under the Provincial Insolvency Act, as it was thought that illusive attachments in favour of the debtor's friends or re-

(1) Ram Labhaya Mal Debi Ditta Mal v. Chanchal Singh Jaswant Singh, I. R. 1931 Lah. 802 : 133 I. C. 626 : A. I. R. 1932 L. 28.

(2) Maung Tin and others v. Saw Eu Huke, 158 I. C. 610 : A. I. R. 1935 Rang. 281.

(3) Dholan Das v. Walab Das, 1919 S. 1 ; 13 S. L. R. 187 : 56 I. C. 158.

(4) Ponnuswamy Chetty v. Narayan Swamy Chetty, 14 M.L.T. 305 : 25 M.L.J. 545 : 21 I. C. 293.

(5) Mulla P. 93 ; *Ex parte* Villars, (1874) L.R. 9 Ch. App. 432. See P. T. I. A. s. 53 (3) ; s. 51 (3). Prov. I. A.

(6) Kanai Lal Nandy v. Tinkari De, 145 I.C. 429 : A.I.R. 1933 C. 564.

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(f).

latives with a view to take the property out of the reach of creditors were not so common in the Mofussil as in Presidency-towns (1),

"Decree of any court for the payment of money" Clauses (c) & (h) of section 6 must be construed to have the same meaning as under Clause (h). The phrase "for the payment of money" means a decree which has been passed personally against the individual concerned and does not include a decree for sale of the property on the foot of a mortgage (). It is intended to apply to a person who is responsible for the payment of his own debts. It has no application to a person who has been adjudicated and to the acts of the Official Assignee in the process of the insolvency administration (3). The facts of this case were somewhat peculiar. On 13th July, 1926 A made an application for the adjudication of B. The adjudication order was made on 23rd July, 1926, but it was rescinded in March, 1927 on the ground that no act of insolvency had been made. In the meantime, on 20th January, 1927, A got the property of D sold in execution of a decree for the payment of money. The Official Assignee had been added as a party to the proceedings. On 27th April, 1927, A filed an application for the adjudication in insolvency of D alleging that B had committed an act of insolvency as he had allowed the property to be sold on 28th January, 1927. It was held that the sale was not an act of insolvency.

Again, property sold must be the property of the person against whom the application is made. Thus where in execution of a decree against the partnership the property of one partner was sold, it was held that the second partner could not be adjudicated insolvent under the clause because it cannot be said that the separate property of one partner becomes the property of the other by reason of their being partners (4). If the partnership property had been brought to sale within three months of the presentation of the petition for adjudication all the members of the partnership could be adjudicated insolvents (5).

Clause (f); Debtor's petition to be adjudged insolvent - The presentation of petition by the debtor shall be deemed an act of insolvency within the meaning of this section, *vide* section 7, Explanation. It does not matter if the petition is rejected (6) or dismissed (7). In the Lahore case it was held that presentation of a fresh petition for insolvency after annulment of a previous adjudication constitutes a fresh act of insolvency entitling a creditor to present an application for adjudication of the debtor as an insolvent. The presentation of the petition by the debtor is in itself an act of insolvency, justifying the making of an order of adjudication. But it must be done within three months of the date on which the debtor presented his petition and not within three months of the dismissal of such petition (8).

(1) Mulla, P. 93.

(2) Baij Nath v Gajadhar Prasad, 11 Luck 61 : 154 I. C. 908 : A.I.R. 1935 Oudh 406 ; Vakkalagadda Venkata Rama Lakshmayya v. Parepalli Subba Rao, A.I.R. 1937 Mad. 433.

(3) Lachmi chand Jhawar v. Bipin Behari Ghose, A. I. R. 1928 Cal. 644 : 115 I. C. 356.

(4) Ramasankara Aiyar v. Firm of V. K. R. Krishna Aiyar, A. I. R. 1926 Mad. 976 : 97 I. C. 393.

(5) *Ibid.*

(6) Jammal Din v. Bishambar Dial, 109 I. C. 578 : A. I. R. 1929 Lah. 72 (1).

(7) Gopal Das Aurora Debtor, In Re. A. I. R. 1926 Cal. 640 : 94 I. C. 793.

(8) Kanai Lal Nandy v. Tinkari De, 145 I. C. 429 : A. I. R. 1933 Calcutta

Clause (g).—The clause lays down that if a debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts, the debtor commits an act of insolvency and the creditor can go to the insolvency court for obtaining an order of adjudication against him. (1).

The reason of the rule is that when the debtor has refused or expressed his intention not to meet his liabilities it is but just that the bankruptcy court should step in, take possession of all the assets of the debtor, and secure the payment to creditors of their debts. No particular form of notice is prescribed by the Act. It may be oral or in writing (2), but it must be a notice in an unambiguous, decisive and in a definite form of words to a particular creditor at a definite time, that the debtor has suspended payment of his debts (3). It may be added that although no written notice of such suspension is necessary, yet it must be in a sense formal and must not merely be the result of a casual conversation (4).

Notice of suspension is different from suspension of payment.

A person may admit that he is insolvent but it will not by itself amount to an act of insolvency. In order to constitute suspension of payment as an act of insolvency, the debtor must give notice to creditor that he has suspended the payment of his debts (5).

To any of his creditors.—Notice need not be given to all the creditors. It is sufficient that it is given to any one creditor but the suspension of payment should relate to all the debts of the debtor (6). Notice to creditor's mehta is valid (7). It may be given to a representative of the creditor, as counsel (8), or solicitor, or managing clerk (9). A person whose only right is to bring an action for damages is not a creditor (10).

"Suspension of payment".—The expression, "suspended payment of his debts" means entire suspension of his whole indebtedness, or as is colloquially said of a bank notice to stop payment, *i. e.* notice of a general intention to stop payment to everybody. Suspension of payment is a business term usually applied to traders; it means failure to meet one's

(1) *Bonarsidass v. Baldev Singh*, 82 I. C. 742 : A. I. R. 1925 (O) 222 : *Mercantile Bank v. Official Assignee, Madras*, 89 Madras 250 : 35 I. C. 942 : A. I. R. 1917 Mad. 525.

(2) *Erparate Nicholl*, 13 Q. B. D. 469.

(3) *Narayan Das v. Ciman Lal*, 102 I. C. 191 : 49 All. 321 : A. I. R. 1927 All. 266 ; *Bonars Das Kapur Chand v. Maman Chand Radha Kishan*, A. I. R. 1933 Lah. 113 : 141 I. C. 6 ; *Gurmukh Singh v. Ramditta Mall*, A. I. R. 1929 Lah. 136 : 112 I. C. 132 ; In the matter of a petition by M/s David, Sassoon and Co., A. I. R. 1926 S. 246 : 95 I. C. 453 : 22 S. L. R. 32. *Sooniram Ramniranjandas v. Chettyar*, S. A. R. M. 12 Rang. 64 : 149 I. C. 723 : A. I. R. 1933 Rang 363. *M. S. M. M. Chettyar v. Doraswamy Moodaliar*, 11 Rang. 96 : 143 I. C. 775 : A. I. R. 1933 Rang. 41 ().

(4) *Erparate Oastler*, (1884) 13 Q. B. D. 471 ; *Lakhi Parshad Singhania v. Ugrah Misr* 13 Pat 73 : A. I. R. 1933 Pat. 461 : 143 I. C. 39.

(5) *Harbans Lal v. Bute Khan*, A. I. R. 1933 Lah. 725 (1) : 146 I. C. 628 (1) ; *A. M. Murugappa Chettyar v. A. Galliara and others*, A. I. R. 1934 Rang 87 : 151 I. C. 190 : 12 Rang. 150.

(6) (Firm) *Sooniram Ramniranjandas v. S. A. R. M. Chettyar (firm)*, A. I. R. 1933 Rang. 363 : 12 Rang 94 : 149 I. C. 723.

(7) *Chaturbhuj v. F. O. Kewalram*, A. I. R. 1931 Sind 179 : 25 S. L. R. 322 : 134 I. C. 996.

(8) *Maharaj Kishore Khanna v. Netherlands Trading Society*, A. I. R. 1930 Cal. 555 : 128 I. C. 246.

(9) *Re A Debtor*, (1929) 1 Ch. 362.

(10) *Re Miller*, (1901) 1 Q. B. 51.

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(g).

engagements in paying debts in the ordinary course of business as they become due and payment is called for (1). Refusal to pay a particular creditor is not suspension of payment when the validity of the debt is disputed (2). It is not suspension of payment even if the denial of the debt due to one particular creditor is deliberately false (3).

Suspension of payment may be temporary.—The leading English authority is *Crook v. Morley* (4). The Earl of Selborne observed as follows :—"To suspend" in its natural signification, rather means something which may not be permanent than that which necessarily is so. A perpetual stoppage of payment would be a suspension and something more; but to say that the word 'suspension' means nothing in this context but a necessarily permanent stoppage of payment, is a proposition to which I cannot agree. A stoppage of business in the ordinary course, and of the payment of debts in the ordinary course, is so serious a thing in many, if not, in all businesses, certainly for example, in the business of a banker, that the Legislature might well consider it a sufficient reason for giving the creditors the power of treating it as an act of bankruptcy in itself, without entering into the question whether in conceivable circumstances and by conceivable methods it might not come to an end and business be resumed. I cannot but think that it would be doing violence to these words if a suspension of payments *de facto* whether in circumstances which might make it possible to resume them or in circumstances which might make that impossible, were not to be enough.

The above statement of law has been followed in India (5). Similarly it has been held that dishonouring of cheques upon solvent current account is suspension of payment even though payment be renewed at some future date (6).

Declaration of inability to pay—when it amounts to notice of suspension of payment.—The two leading English cases are *Crook v. Morley* (7). and *Clough v. Samuel* (8). In the first case the debtor had addressed a letter to his creditors which ran as follows:—"Being unable to meet my engagements as they fall due, I invite your attendance at the Guild Hall Tavern, Gresham Street, City, on Wednesday next at 3 p. m., when I will submit a statement of my position for your consideration and decision."

As a result of this letter a meeting was held on the date specified and a composition at 2s. 6d. in the pound was offered by the debtor but was refused by the creditors. The House of Lords, affirming the decision of the Court of Appeal, held that the letter would naturally induce

(1) *Re Lamb*, (1887) 4 Morr. 25, 32.

(2) *Narayan Das v. Chiman Lal*, A. I. R. 1927 All. 266 : 49 All. 321 : 102 I. C. 191.

(3) *Ma Nagwe Suit and others v. Ko Po Hla and another*, A. I. R. 1935 Rangoon 340 : 159 I. C. 749.

(4) 1891 A. C. 316, 320.

(5) *Banarsi Das Kapur Chand v. Maman Chand Radha Kishan*, A. I. R. 1933 Lah. 113 : 141 I. C. 62; In the matter of a petition by Messrs. David Sassoon and Co., Ltd., Karachi, A. I. R. 1926 Sind 246 : 95 I. C. 453.

(6) *(Firm) Sooniram Ramniranjandas v. Chettyar*, 12 Rang. 64 : 149 I. C. 723; A. I. R. 1934 Rang. 363; *Dwarka Das Javer Mal v. David Sassoon*, 121 I. C. 865; A. I. R. 1930 Sind 83.

(7) (1891) A. C. 316 : 61 L. J. Q. B. 97 : 65 L. T. 389 : 8 Morr. 227.

(8) (1905) A. C. 442 : 74 L. J. K. B. 918 : 93 L. T. 491 : 54 W. R. 114 : 12 Manson 347 : 21 T. L. R. 702.

the creditors to believe that the debtor intended to suspend payment of his debts and therefore amounted to a notice that he was about to suspend payment of his debts within the meaning of the English Bankruptcy Act. In the course of his judgment the Earl of Selborne cited with approval the opinion of Bowen, L.J., in the case of *In re, Lamb*, [(1887) 4 Morrell 25] that the question always is: What effect would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors," and Lord Watson, one of the other judges, observed as follows :—

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(g).

"A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful."

The learned and noble Lord was of opinion that the words: "When I will submit a statement of my position for your consideration and decision" were confirmatory of the intimation conveyed in the first part of the circular, because they suggested that the sender would not be able to resume payments, or to carry on his business unless the creditors agreed to accept a composition. The same question of law was later considered in *In re Reis* (1). In that case the debtor, Reis, instructed his solicitor on 26th May, 1903 to see two of his largest stock exchange creditors with reference to his accounts with them. The solicitor informed the two creditors that Reis would have difficulty in paying them the amount due to them on the date fixed for payment and that he had Reis's authority to permit them, if they saw fit, to close their accounts with him immediately. At the suggestion of one of these creditors the solicitor communicated the same message, on behalf of Reis, to the only two other stock exchange creditors and gave them the like permission. In consequence of this all these creditors immediately closed their accounts and took proceedings to recover their debts and obtained judgments against Reis and thereafter a receiving order was issued against him on a petition presented by one of them.

The question arose whether Reis had committed an act of insolvency on 26th May, when he instructed his solicitor to communicate his inability to pay his stock exchange creditors and ask them to close his account with them, if they chose to do so. It was contended that the intimation sent by Reis on 26th May to his stock exchange creditors amounted to a notice that he had suspended or that he was about to suspend payment of his debts. It was, however, held that a statement by a debtor that he is unable to pay his debts in full is not by itself an act of bankruptcy, although it may be such if it amounts to a statement that he intends to deal with his creditors as a body, and consequently it was held that the transaction of 26th May did not fall within this category: Stirling, L.J., concluded his judgment on this part of the case with the following observation :—

"The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend

(1) (1904) 2 K. B. 769; 73 L. J. K. B. 929; 91 L.T. 592; 53 W. R. 122; 11 *Manson* 229; 20 T.L.R. 547.

S. 6 payment of his debts ; that is to say, to abstain from paying his debts as they fall due, at least for a time.' Vaughan Williams, L.J., considered that all that the solicitor was doing on behalf of the bankrupt, when he made the communication to the stock exchange creditors was to negotiate with particular creditors as regard their particular debts and came to the conclusion that the conduct of Reis did not amount to a notice to the creditors that he had suspended or intended to suspend payment of his debts. This judgment was affirmed by the House of Lords in *Clough v. Samuel* (1). There the Lord Chancellor observed that :

"In order to be an act of bankruptcy it must be a notice and although the statute does not require any particular form of notice, still it must be a notice. I do not know that the word "notice" can be made clearer than it is by any verbal explanation but it must be a notice and that the debtor neither did, nor intended to do any such thing as to give notice to his creditors, or to any of them that he intended to suspend the payment of his debts," and further "but I think he had no intention of giving notice that he intended to suspend payment, from which an ordinary business man would infer that what Spyer (the solicitor) said on his behalf, or what he said himself, was a notice of intention to suspend payment of his debts. I dare say a business man would infer that he was likely to do it, or perhaps that he was likely even to become bankrupt, but he would infer that from the circumstances and not from anything said by either Spyer or Reis."

Lord Roberts in discussing the same question expressed himself as follows :

"It seems to me that in the conception of sub-section (h) with which, we have to deal, the suspension of payment of his debts is a specific and deliberate (in the sense of intentional) act of the debtor, and the suspension actual or intimated, must apply to all the creditors. It is something different from and over and above inability to pay. It is one of the several courses among which a debtor may elect when he finds himself insolvent. A man faced by a balance-sheet which means certain and speedy ruin may try to arrange with his more pressing creditors, or he may put off the evil day and stagger on leaving the stoppage of his career to be brought about by the action of others. Either of those courses is different from suspending payment of his debts."

The following principles are deducible from the exposition of law as given in the above two cases :—1. The question is more one of fact than of law (2), and where it is difficult to distinguish between an admission of insolvency and a notice of suspension, in such a case the rule is that each case must be decided on its particular facts and that it is the effect on the mind of the hearer that has to be judged (3). 2. The second is that a mere statement by a debtor that he is not able to pay is not necessarily a notice within the meaning of the Act that he is suspending or is about to suspend payment (4). 3. The third principle is that one has

(1) (1905) A.C. 442 : 74 L.J.K.B. 918 : 93 L.T. 491 : 54 W.R. 114 : 112 Manson 347 : 21 T.L.R. 702.

(2) *Bamaswami Chettiar v. Muthialuswami Chettiar*, A. I. R. 1928 Mad. 903 : 109 I. C. 88.

(3) *Dwarkanah Javer Mal v. David Sassoon*, 121 I. C. 865 : A. I. R. 1930 Sind 88.

(4) *Kanhya Lal Bhargava v. Banwari Lal*, A. I. R. 1936 Cal. 269 : 166 I. C. 657.

to ascertain what the words used by the debtor would reasonably and ordinarily mean to the mind of a creditor. To satisfy the requirements of the law we must look for an unqualified, unconditional notice from which an ordinary man of business would understand that if the creditors refuse the debtor's proposal for a settlement, the debtor has no alternative but to suspend payment (1). 4. The fourth is that in construing the words of the debtor it has to be seen whether he has clearly indicated that not only is he not going to pay a particular creditor but that he intends to deal with his creditors collectively (2).

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(8)

These principles have been followed almost universally, without a single note of dissent, by the Indian Courts in construing the Indian Acts.

Statements held amounting to notice of suspension.—The following statements taken with the surrounding circumstances have been held to amount to notice of suspension :—

(1) The debtors were being pressed for payment of debts and they were unable to pay. On one of these occasions they invited the creditors and offered their property consisting of two houses and garden to them, omitting the house in which the debtors were living, in discharge of their debts, but no settlement was reached. A few days after, creditors again held a meeting and asked the debtors as to how they proposed to pay their debts. The debtors showed an unwillingness to place all their property at the disposal of the creditors. All of them then went away agreeing to meet the next day. Next day the creditors again came ; one of the debtors was sent for but he did not come. The debtors were hopelessly insolvent. On these facts it was held that the debtors had by their conduct and statements given notice that they were about to suspend payment (3).

(b) A merchant said to his creditors, "If you do not accept my offer I shall have to close my business". These words amount to notice (4).

(c) A request by the debtor to his creditors that they should not press for payment till such time as the market improves and in the alternative an offer to settle at a certain percentage is sufficient notice under section 6 clause (g) (5).

(d) Where the person insolvent not only makes a statement that he is unable to pay his debts, but further tells his creditors that he intends to deal with them collectively and not with one or more of them individually, such a statement clearly amounts to notice within clause (d) (6).

(e) The debtors were in embarrassed circumstances and were not in the position to pay their debts. They called a meeting of their creditors and offered to mortgage their property to enable them to meet their liabilities.

(1) *Dwarkan Das Javer Mal v David Sassoon*, 121 I. C. 865; A. I. R. 1930 Sind 83; *Maung Sein Nyun v. Dawson Bank, Ltd.*, 135 I. C. 656; A. I. R. 1931 Rang. 317.

(2) *Lakhi Prasad Singhania v. Ugrah Misr*, 13 Pat. 78; 148 I. C. 39; A. I. R. 1933 Pat. 461; *Hardayan Das v Jagan Nath*, 152 I. C. 655; A. I. R. 1934 Pat. 326.

(3) *Ramaswami v. Muthialuswami*, 109 I. C. 83; A. I. R. 1928 Mad. 903.

(4) *Dwarkan Das Javer Mal v David Sassoon*, A. I. R. 1930 Sind 83; 121 I. C. 865.

(5) *David Sassoon and Co., Ltd, Karachi*, In the matter of, 95 I. C. 453; A. I. R. 1926 Sind 246.

(6) *Gurmukh Singh v. Ram Ditta Mal*, 112 I. C. 122; A. I. R. 1929 Lah. 136.

S. 6 ties and negotiations were started for the purpose, but fell through. They (g). further stated that they intended to deal with the creditors collectively and not individually. It was held that the circumstances were sufficient to induce the creditors to believe that the debtor intended to suspend payment and it was therefore tantamount to notice to that effect within the meaning of section 6 clause (g) (1).

(f) Where a judgment-debtor brought before the court at the instance of the judgment-debtors under section 55 Civil Procedure Code intimates through his counsel that he intends to apply for an adjudication as an insolvent within one month and asks for an order of release under section 55 clause 4 Civil Procedure Code, he thereby gives notice to that creditor, although he be not present in person and be represented by his counsel, that he is about to suspend payment of his debts. He commits, as such, an act of insolvency within the meaning of the Act (2).

(g) A statement by a debtor that he was utterly penniless and that he could not pay to a person from whom he had received a certain sum of money in consideration of his agreeing to take him as a partner at a future date in certain events was held to be sufficient to amount to an act of bankruptcy (3).

(h) The debtors, who had become involved in debts, sold their property in order to meet their creditors and offered to make a rateable distribution among their unsecured creditors of the balance of the sale-proceeds after satisfying a mortgage-debt on the property. The intimation given to one creditor was to the effect that they would not pay anything to him unless he agreed to accept in full settlement the small amount which they offered. *Held*, there was a notice to suspend payment (4).

(i) Where a debtor sent a registered post-card bearing signature through one of his creditors stating that there were so many debts that he was not able to make payment and it was useless for the creditor addressed to continue to make demands and that he might do whatever he liked in the matter. It was held that the post-card amounted to an act of bankruptcy (5).

Statements and acts not amounting to notice of suspension of payment :—

1. The fact that the debtor has called a meeting of the creditors and offered a composition is not sufficient notice (6).

2. A statement by the debtor's solicitor that a receiving order will be applied for immediately is not sufficient notice (7).

3. A communication to a creditor by a solicitor that he had received instruction from the debtor to issue circular letters is not sufficient notice (8).

(1) *Banarsi Das-Kapur Chand v. Maman Chand-Radha Kishan*, A. I. R. 1933 Lah. 113 : 141 I. C. 62.

(2) *Maharaja Kishore Khanna v. Netherlands Trading Society*, A. I. R. 1930 Cal. 555 : 123 I. C. 246.

(3) (1901) 1 K. B. 51 : 70 L. J. K. B. 1 : 49 W. R. 65 : 83 L. T. 545 : 8 Manson 1 : 17 T. L. R. 9.

(4) *Veera brahmam v. Jagannadha Charyulu*, 153 I. C. 966 : A. I. R. 1935 Mad. 589 (2).

(5) *L. Piarey Lal v. Mohammad Sulamat Ullah Khan*, A. I. R. 1937 All. 457.

(6) *Re Walsh, Ex parte the Trustee*, (1885) 2 Mor. 112.

(7) *Trustee of Lord Hill v. Rowlands*, (1886) 2 Q. B. 124.

(8) *Re Morgan, Ex parte Turner*, (1915) 2 Mans. 508.

4. The mere fact that a person admits he owes money to a creditor and also admits that he is unable there and then to pay the amount cannot possibly be read as the commission of an act of insolvency (1).

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5. Where in response to a letter by one of the creditors the debtor mentioned his inability to pay and suggested that money might be raised on some shares pledged with the creditor in order to meet the claim of the pressing creditors only and the debtor further expressed his willingness to a scheme of creating a trust for the liquidation of his debts, it was held that there was no act of insolvency so as to support an insolvency petition (2).

6. A debtor had collected his creditors and had there told them that if they did not want him to sell the property and pay them individually, they could take over the property and realise their debts by selling it themselves. It was held that this did not amount to a notice to suspend payment within the meaning of Clause 1 (g) (3).

7. The debtors carried on business as cloth merchants and bankers. Four creditors went to the debtors and asked for payment of money. They were told by one of the debtors that they could take all the money he had but they asked for payment in full. Thereupon he said, "you can take all the money I have and for the rest you can take a mortgage on my dues or properties, whichever you like." It was held that the statement could not be treated as a notice of suspension (4).

8. Where the debtor informs creditors that he could not pay all at once on a particular day but requested for time and the words used were:—"I am unable to meet your demands owing to the peculiar circumstance, viz., that you are all demanding instant payment of your dues; but give me time to satisfy you that I am perfectly solvent" it was held that that cannot amount to a suspension of payment (5).

9. The debtor, through his counsel, addressed a letter in which he set up an agreed arrangement for payment of the mortgage debt and wanted time to pay up the arrears according to the arrangement. It was also admitted that owing to the depression in trade the debtor was finding it difficult even to pay his employees and meet taxes regularly. On a consideration of all these circumstances it was held that the debtor did not give any notice of suspension (6).

Clause (h). Imprisonment in execution of decree.—This is one of the acts of insolvency which does not depend on the debtor's volition. A creditor can, by this means, compel an insolvent to commit an act of insolvency. This act of insolvency is a continuing one. It begins when the man is imprisoned and lasts so long as he remains in prison (7).

(1) *Veerayya v Doraiswamy*, 110 I C 737 : A. I. R. 1928 Mad. 393.

(2) *Harkishan Lal v. Peoples Bank of Northern India*, A. I. R. 1932 Lah. 643; 140 I. C. 275; 14 Lah 117 C. A. P. C. S. Chettyar v. V. V. R. Chettyar, 13 Rang. 686; 159 I. C. 1055; A I R 1935 Rang. 352.

(3) *Ladha Ram v Lurind Chand Lachman Das*, 141 I. C. 276; *Veerayya v. Doraiswamy*, 110 I C. 737; A. I. R. 1928 Mad 393 and *Narayandas v. Chimanlal* A. I. R. 1927 All 266; 49 All 321; 102 I. C. 191;

(4) *Lakhi Parsad Singhania v. Ugrah Misr*, 13 Pat. 78; 148 I. C. 39; A. I. R. 1933 Pat. 461.

(5) *S. A. R. M. Chettyar Firm*, In the matter of, 149 I. C. 1036; A. I. R. 1933 Rang. 280.

(6) *M. S. M. M. Chettiar v. P. Doraswamy Moodaliar*, 148 I. C. 755; 11 Rang. 96; A. I. R. 1933 Rang. 41 (2).

(7) *Karam v. Jhanda*, 131 I. C. 112; A. I. R. 1931 Lah. 112.

Does an insolvency petition lie after determination of imprisonment?—In an old Bombay case (1), which was under section 9 of Indian exp. Insolvency Act, 1848, it was held that the petition could be presented even after the discharge of the debtor from prison.

In a later Bombay case, decided under the same section, it was held that the petition must be presented while the debtor was still in prison (2). Mulla has expressed his opinion that the older Bombay case is not good law and has relied for his opinion on the words "If he is imprisoned" used in the present section. The learned commentator's attention was however not drawn to section 9, clause (c), which enacts that an insolvency petition against a debtor may be presented within three months of the commission of act of insolvency on which the petition is grounded. The act of insolvency mentioned in clause (h) commences from the date of imprisonment and continues till the debtor is released. The period of three months prescribed in section 9 can begin at the earliest, from the date of imprisonment and at the latest, from the date on which imprisonment ends. The construction sought to be put by Mr. Mulla on the words "if he is imprisoned" is clearly in conflict with the express provision of section 9. I am fortified in this view by the judgment of Bhide, J. in *Karam v. Jhanda* (3). In that case Karam the debtor was sent to prison about the end of January 1929 and remained there till April 1929. The application for insolvency was presented in May 1929. The question before the court was as to whether the application was within time. It was conceded that if the period of limitation were to be computed from the date on which Karam was actually put in prison, the application was time-barred. It was, however, held that the act of insolvency continued through the period during which Karam remained in prison and that the application was within time. It is true that the present question was not directly before the learned judge nor the Bombay authorities were cited before him but the point was impliedly assumed. Interpreting the word "imprison" the learned judge remarked that according to the dictionary, the word "imprison" does not necessarily mean the first act of putting a person in prison but is also used in the sense of "detaining in prison".

S. 6 ; Explanation.—Section 6 enacts and defines the various acts of insolvency which a debtor may commit. The explanation extends the scope of the main section by enacting that for the purposes of this section the act of an agent may be the act of the principal. The explanation to section 9 of the Presidency-towns Insolvency Act contains the additional words, "Even though the agent has no specific authority to commit the act"; but this does not make any difference in substance between the provisions of the two Acts.

It should also be noticed that the Legislature has used the word "may" and not "is". It means that the act of an agent is not necessarily the act of the principal, but it may be if circumstances are such as to justify the imputation of the act of an agent to the principal.

English Law Different—In England before the Act of 1913 it was held that the act of bankruptcy must be a personal act, and could not be committed by the act of an agent which the principal had not

(1) In the matter of Thacker Bhagvandas Harjivan, (1880) 4 Bom. 489.

(2) *Re Ahmed Ismail Munshi*, (1902) 26 Bom. 649.

(3) A. I. R. 1931 Lah. 112 : 131 I. C. 112.

authorised, and of which he had no cognizance (1). The rule laid down in *Ex parte Blain* was followed in *Cooke v. Charles A. Vogler Co.*; both these cases were of a foreigner domiciled and resident abroad, having business in England. In both of these decisions it was conceded that if the law had been different the courts would have had to take a different view. Section 8 of the Act of 1913 introduced the definition of the word "Debtor," which is now reproduced as sub section (2) to section 1 of the Act of 1914. For full and detailed treatment see commentary under section 7, under the heading "debtor."

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In India the English rule has been departed from by the enactment of the present explanation. In India, therefore, a principal can be adjudicated on an act of insolvency committed by his agent. It does not, however, confer any new jurisdiction on the Indian courts in the case of foreigners doing business in India. This departure from the English law is obviously a necessary one. In India there is a class of agents called *Gomashtas*. The *gomishtas* do not always occupy the bare position of an agent. There are many firms in India which are exclusively managed by them. The beneficial owners have no practical control over the firm and they are unknown to the customer. This was recognised by their Lordships of the Privy Council in *Kastur Chand's case* (2) and their Lordships refused to accept the view taken by the Calcutta High Court that the only case in which an act of insolvency committed by an agent could be imputed to the principal was where the act was expressly authorised by him or was one of which he had notice. The explanation to the section gives effect to the observations of their Lordships (3).

Cases falling under the Explanation.—In the first category are included all those cases where the act of the agent was committed with the express authority of the principal or where the principal had notice and previous knowledge of the agent's act. Such cases will enable the creditor to obtain an order of adjudication both in England and India. The second category comprises the acts of agents who come within the definition (given below) of special *Gomashtas*. In the ordinary course of business, it is not within the general scope of an agent's power to commit an act of insolvency on behalf of his principal (4). The mere fact of a person being an agent of a firm cannot in law entitle him to allow a creditor to obtain an order of adjudication, because he, the agent, purports to commit an act of insolvency within the meaning of the section. It is incumbent on the court to require proof from the adjudicating creditor that the agent who is alleged to have committed the act of insolvency was expressly or impliedly authorised to do so, or that the ordinary course of the business that he carried on for his principal or that the nature of such business, was sufficient to justify the court holding that the agent's acts should be considered, in the circumstances, to be the acts of his principal (5). Applying this test it was held that a person who is acting merely as a clerk has no authority, either express or implied, to act as an agent, far less

(1) *Ex Parte Blain*, (1879) 12 Ch. D. 522, 529; *Cooke v. Charles A. Vogler Co.*, (1901) A. C. 102.

(2) *Kasturchand v. Dhanpat Singh*, (1896) 22 Indian Appeals 162: 23 Cal. 26.

(3) Mulla, Pp. 101, 102.

(4) *Allagappa v. Nagindas*, 98 I. C. 431 : A. I. R. 1926 Bom. 338.

(5) *Abdul Sattar v. V. E. A. R. M. Chettiar & Firm*, 10 Rang. 215; 138 I. C. 189 : A. I. R. 1932 Rang. 101.

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to do acts such as giving notice of suspension of payment on behalf of the principals of the firm (1).

As regards the second category of cases the earliest case is *In re Hurruck Chand* (2) decided by the Calcutta High Court under the Indian Insolvency Act. It was held that a trader residing out of the jurisdiction of the High Court, but carrying on business at Calcutta by a Gomashta, can be adjudicated an insolvent under the Act, if his Gomashta stops payment and closes and leaves his usual place of business or does any act which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent. The exact position of the Gomashta and the powers he exercised in the carrying on of business are not fully given in the report. The point next arose in *re Dhanpat Singh* (3). There D, a resident of Azimgunje, carried on business as a banker and moneylender in (amongst other places) Calcutta through his Gomashta, who carried on the business on the second storey of the business premises having his residence on the third storey, the whole of the premises belonging to D. D having gone away on pilgrimage, the Calcutta business became involved and on the 6th February, 1893 P stopped payment and retired to the third storey, but was accessible to all creditors either in the office where their business was usually carried on, or in the private room on the third storey. Upon such stoppage of payment telegrams were sent to D, who hurried back to Calcutta, and reached it on 11th February, and took up his quarters in the same premises and subsequently had several meetings with his creditors. Two questions arose for decision. The first was that the stoppage of payment and the retirement of P to his rooms on the third storey amounted to an act of insolvency or not. This question was answered by the High Court in the negative. The second question was that, assuming that an act of insolvency had been committed by P, did the act of the agent bind the principal or not? Following the English law on the point it was held that a man cannot commit an act of insolvency by an act of his agent which he had not authorised, and of which he had no cognizance. The case was taken on appeal to the Privy Council *Sub. nom Kustoor Chant v. Dhanpat Singh*. (4). Their Lordships agreed with the findings of the High Court on facts but they refused to assent to the legal proposition. They held that in some cases a gomashta's act, without the principal having specifically authorised it, or having had cognisance of it, might bind the principal in a way as to make him liable to be adjudged insolvent. In laying down the law, their Lordships made the following important observations :—

"The position of a gomashta differs in different cases. In some cases he may be little more, or no more, than any ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice Pigot states the possible position of a gomashta with even more force than does Mr. Justice Broughton. He says: 'It often happens that a large business is carried on for years by munib gomashta or by a succession of them in the name of principals who never are seen,

(5) S. A. R. M. Chettyar Firm, In the matter of, A. I. R. 1933 Rangoon 280 : 149 I. C. 1035.

(6) 5 Cal. 605.

(7) 20 Cal. 771.

(8) (1896) 22 I. A. 162 : 23 Cal. 26.

or personally known, in connection with the business at all ; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation and of which firms it is or may be difficult to determine who are, at any given time, actually members." He has himself known a case in which a family owned a business for more than a century, the owners being counted by scores, and many of their *kotis* being managed by Gomashtas whose office passed from father to son, as though it were hereditary. Yet even in such a case as that he thinks that the principle of Hurruck's case (1), would not be applicable. S. C
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" Their Lordships think otherwise. They cannot hold that the creditor of firms exclusively managed by Gomashtas have no remedy by way of insolvency, whatever the gomashtha may do ; though he may make fraudulent conveyances, promote fraudulent executions, or, as in Hurruck's case (2), lavant "leaving the creditors to find him or his master if they could." And yet that consequence must follow if the principle laid down by the High Court in this case be the true one.

"It may be desirable that, as Mr. Justice Pigot suggests, the Legislature should intervene. Their Lordships express no opinion on that subject. But in the meantime the Statute should be interpreted with reference to the facts of Indian life. And it is a question in each case whether the Gomashtha occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or the flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the judges who have held that the Statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases."

In the above Privy Council case there has been drawn a distinction between an ordinary agent and an agent who has exclusive control of the business and occupies a such a position that the principal must stand or fall by his acts. Such acts may consist in executing a transfer for the benefit of the creditors, to defeat or delay creditors, or by way of fraudulent preference, or in departure from the principal's usual place of business, or it may consist in giving notice of suspension of payment of debts.

The proposition of law laid down above was followed in a Calcutta case (3) decided in 1904 and in a recent Ragoon case (4). In the last mentioned case it was held that the position of an agent or Aiyar of a Chettyar private bank in Ragoon is very similar to the position of a Bengali Gomashtha, and he has authority to issue the notice of suspension of payment.

In a Madras case (5) decided under the Provincial Insolvency Act, the explanation was applied, though no reference was made to the Privy Council authority referred to above. An act of insolvency by a co-judgment-debtor does not amount to one by the judgment-debtor himself (6). Where one of the receivers appointed during the pendency of the partition

(1) I. L. R. 5 Cal. 605.

(2) I. L. R. 5 Cal. 605.

(3) In the matter of William Watson, 1904, 31 Cal. 761 : 779 (I. I. A., 1848).

(4) Firm Sooniram Ramniranjandas v. S. A. R. M. Chettyar (firm), A. I. R. 1933 Ragoon 363; 149 I. C. 723 : 12 Rang. 64.

(5) Kaianji Singhji Bhai v. The Bank of Madras, 39 Mad. 693 : 31 I. C. 593; A. I. R. 1916 M. 144.

(6) Chandra v. East India Coal Co., Ltd., 14 I. C. 576 ; 16 C. W. N. 733.

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proceedings of a joint family firm was its managing member, who had declared to the creditors of the firm after his appointment of receiver as such that the firm could not satisfy their debts and that they would be paid *pro rata*, on which the creditors applied for declaring the firm to be insolvent, it was held that as the firm was not in a position to pay its debts as they fell due and as the managing member admitted that fact to the creditors, the whole proceedings from institution of the partition proceedings constituted an act of insolvency, that the receivers appointed in partition proceedings were carrying on the wishes of the partners and must be considered agents of the firm and the partners must be bound by the act of their agents (1).

Partner as agent.—The following passage from Mayne's Law of Partnership in British India correctly states the law on the subject :—

“ The criterion, therefore, is whether the partner has committed the act of insolvency in his capacity as a partner of the firm and on its behalf, or in his private capacity ; whether or not the act of insolvency is in point of fact the act of the firm as well as his. If the former, the act of insolvency is of the firm. Where the debt is due by all the partners or by the firm the creditor may obtain an adjudication against all or any or one or more of them may in that case obtain an adjudication of insolvency. It is clear that any partner, whether nominal or dormant, and even a person who holds himself out as a partner, but is not a partner in fact, may be adjudicated insolvent. The reason is that all of them are personally responsible (2).

Upon the authorities two questions have generally arisen for the consideration of the courts. The first is as to whether a firm comes within the definition of a debtor for purposes of section 7 and if so to what extent. The second question relates to the authority of a partner as an agent for committing an act of insolvency in order to bind the firm or the other partners of the firm. It is settled law that a partnership has in law no corporate personal existence distinct from that of its individual partners. At the same time in many places a distinction has been drawn between partnership property and the separate property of an individual partner. Similarly a partner has been given a private capacity as well as a capacity as partner of the firm. Here we are concerned with the second question only.

A reference to acts of insolvency described in section 6 makes it apparent that certain acts of insolvency are committed in respect of property while others are personal acts of a person. In regard to acts of insolvency in respect of property, if it is established that the property is partnership property and that it was transferred under clauses (a), (b) and (c) of section 6, or sold under clause (e) in such a manner as to bind the firm in general law, the act of insolvency so committed shall be one of the firm, and the firm, as such, (other things being equal) can be adjudicated insolvent.

In cases where the act of insolvency depends on the personal act of a person, it is a question of fact depending on the circumstances of each case as to whether the partner committing the act was such an agent as that his act may be considered as the act of the firm or other partners. .

(1) Chaturbhuj v. F. O. Kewalram, 134 I. C. 996 : 25 S. L. R. 322 : A. I. R. 1931 Sind 179.

(2) Quoted from Ghanishamdas Parmanand v. E. D. Sassoon and Co., A. I. R. 1926 Sind 90 : 93 I. C. 448.

The English law is different on this point as it is in regard to the Explanation in general. Under the English law the act of bankruptcy must be a personal act and it could not be committed by the act of an agent which the debtor had not authorised and of which he had no cognizance. According to that law, to support an adjudication against a firm each of the partners must have committed some act of bankruptcy. Such act may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy, or that they should all have committed an act of bankruptcy of the same kind. If, however, a joint act of bankruptcy is relied upon, it must be shown to be the act of all (1). The chief pronouncement, which has been approved of in many subsequent cases, is contained in the judgment of Brett, L. J. in *Ex parte Blain* (2). He says:—

“It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent whether he has authorised the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he is not authorised, and of which he has had no cognizance. In *Mills v. Bennett* one of three partners in a banking concern who resided at the place where the banking house was, and was the only partner who transacted the business, the other two residing at a distance from it, absenting himself from the banking house, shut it up and stopped payment, it was held that this was no evidence of a joint act of bankruptcy by all three.”

These principles have been followed by the courts in India. It is not because the law in both the countries is the same, but because it is found in actual practice not to be different. It is impossible to say that there can be no case in which the act of an agent or partner in closing down the business and absconding from the creditors would be treated as an act of the principal or the other partners. There might be cases in which a court would be justified in certain circumstances in holding that the act of the agent or partner in violation of the section might and should be treated as the act of the principal or the other partners (3). As a general rule it is, however, true that the act of a single partner, even though he be a managing partner of a firm, cannot be used for obtaining an adjudication order against the firm or the other partners of the firm. It is wrong to say, as it was said in a Sind case (4), that where one partner gives notice that his firm has suspended payment, it is *prima facie* a joint act on behalf of all the partners, and that the burden lies upon the other partner to show that they were solvent and able to pay the debts of the firm for which they were liable. It is not within the scope of a partner's authority in the ordinary course of business to commit an act of insolvency on behalf of the firm. It must be specially shown that in the circumstances of the

(1) *Mills v. Bennett*, (1814) 2 M. and S. 556 : 105 E. R. 485; *Hogg v. Bridges*, (1818) 8 Taunt. 200 : 129 E. R. 360.

(2) (1879) 12 Ch. D. 522 : 41 L. T. 46 : 28 W. R. 334.

(3) *Gopal Naidu v. Mohanlal Kanhyalal*, 49 Mad. 189 : 91 L. C. 874 : A. I. R. 1926 Mad. 206; *Chandahalu Siva Reddi v. Official Receiver, Bellary*, A. I. R. 1937

S. 6, case the position of the partner was such that by his acts the firm would stand or fall. Following the general rule it has thus been held exp. that when one of two partners departs from his usual place of business with intent to defeat or delay the creditors of the firm, an adjudication order cannot be made against the firm, even though the departing partner was the managing partner and the other partner was residing at a distance (1), unless the other partner also has departed with a like intent or done some other act of insolvency (2). Similarly the sale of the separate property of one partner, even though it may be in the execution of a decree against the partnership, cannot make the firm or the other partners liable for adjudication as insolvents.

Case of a retired partner.—In *All India Reporter 1930 Sind 83* the question arose as to how far a partner who had retired from business but had not given notice of dissolution under section 264, I. C. A. and therefore remained liable to some creditors of the firm, even after his retirement, is liable to be adjudicated insolvent on account of an act of insolvency committed by another partner after his retirement. The point was decided against the retired partner on the ground that section 264 Indian Contract Act is a rule of estoppel and that the retired partner cannot be allowed to plead that he is not a partner; and if an ex-partner cannot plead that he is not a partner, he cannot raise any plea such as want of authority, which may prejudice a petitioning creditor. The act of insolvency relied upon in the case was notice of suspension of payment by one of the partners. It is submitted that the actual decision as well the ground on which it is based is wrong. It is one thing to say that a retired partner, if he fails to fulfil certain conditions of law, is personally liable to pay debts incurred by the firm after his retirement; it is quite another to hold that he is bound by all the acts (including the commission of an act of insolvency) done or committed by the partners left in the firm. By implication of law he may be considered to be a partner for certain purposes but his position is not exactly that of the remaining partners. It is submitted that such a partner can be adjudicated insolvent, but not by virtue of a personal act of insolvency committed by another partner.

Firm in which minor is a partner—A person who is under the age of majority cannot become a partner by contract. He cannot therefore be a member of the firm as defined in section 239, I. C. A., and so according to the definition he cannot be one of that group of persons called a firm. Under section 247, I. C. A., he may, however, be admitted to the benefits of a firm but cannot be made personally liable for any obligations of the firm. His share in the property of the firm is liable for the obligations of the firm and the share of which section 247 speaks is no more than his right to participate in the property of the firm after its obligations have been satisfied (4). A minor, therefore, can, in no case, be adjudged an insolvent and the acts of the other partners as agents of the firm cannot create a personal obligation against him.

Whether a firm, as such, can be declared insolvent in the firm name in which its business was carried on.—See notes under section 7 :

(1) *Gopal Naidu v. Mohan Lal*, (1926) 49 Mad. 189 : 1 I. C. 874 : A. I. R. 1926 Mad. 206.

(2) *Re Mahomed Hasham and Co.*, 75 I. C. 203 : A. I. R. 1923 Bom. 107.

(3) *Sanyasi Charan Mandal v. Krishnadhan Bonerji*, A. I. R. 1922 P. C. 237 : 49 I. A. 108 : 49 Cal. 560 : 67 I. C. 124 ; *Shaw Wallace and Co.*, and another, A. I. R. 1927 Sind 18.

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7. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Explanation.—The presentation of petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

Analogous law.—This is section 5 of Act 3 of 1907. The corresponding provision in the Presidency-towns Insolvency Act is section 10. In England an order of adjudication is preceded by the passing of a receiving order for the protection of the estate; that is provided in section 3 of the Bankruptcy Act 1914.

Subject to the conditions specified in this Act—Sections 9 and 10 lay down the conditions which must be fulfilled in order to entitle a creditor or a debtor respectively to present a petition for insolvency.

“Debtor.” Aliens and Foreigners.—The definition of the word ‘debtor’ as given in section 2 sub-section 1 clause (a) is not exhaustive. In fact, though occurring in the ‘definitions’ section of the Act, it has not been defined at all. The exact meaning of the word “debtor” and the ascertainment of persons included in the word is very important, because, unless a person is a debtor, the insolvency court has no power to adjudge him an insolvent. The act, like the Presidency-towns Insolvency Act, is based on the English Bankruptcy Acts of 1869 and 1883. The English Acts have been altered by including the definition of the “debtor” in section 1 sub-section 2 of the Bankruptcy Act, 1914. The definition as given in the Bankruptcy Act, 1914 runs as follows:—“The expression ‘a debtor’ includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—(a) was personally present in England; or (b) ordinarily resided or had a place of residence in England; or (c) was carrying on business in England, personally, or by means of an agent or manager; or (d) was a member of a firm or partnership which carried on business in England.” Before the enactment of this section, under the Acts of 1869 and 1883, the word ‘debtor’ was held to include only persons properly subject to the laws of England. The leading English cases are *Ex parte Crispin* (1), and *Cook v. Charles A. Vogelaar* (2). In the latter case Lord Halsbury said:

“I think the judgments of James, L. J. and Sir George Mellish laid down a broad substantial rule in dealing with such questions which I should be sorry to see departed from. English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case; while he is here, while he is trading,

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This principle will not however apply if the contrary is expressly enacted or so plainly implied as to make the duty of an English court to give effect to an English statute (1). This has been now done by section 1 sub-section (2) of the B. A., 1914.

Under the old Bankruptcy Acts it was, therefore, held that a foreigner cannot be adjudged insolvent by an English court unless the act of insolvency was committed by him during his personal residence in England. If the act was committed during his personal residence it was not necessary that he should be personally present at the time of the presentation of the petition against him.

Indian law.—The old English law is the present Indian law. It would therefore follow that a non-resident foreigner cannot be adjudicated insolvent by a British Indian court unless he commits an act of bankruptcy during his personal residence in British India. Section 11 of the Provincial Insolvency Act cannot be invoked for conferring jurisdiction, which does not otherwise exist according to the rules of private international law. Section 20, Criminal Procedure Code is similarly worded and it has been held that the operation of section 20 is limited to courts in British India and does not confer extra territorial jurisdiction on British Indian Courts. Moreover, section 11 assumes who a debtor is and does not purport to define a debtor. It only regulates jurisdiction under this Act in the area to which the Act applies, that is the whole of British India, except the Scheduled Districts. *Vide* section 1 of the Act.

Minors.—Minors are not debtors within the meaning of the Act. A minor is incompetent to contract (2), nor he can incur any personal liability by incurring debts or borrowing goods. Even where necessities are supplied to a minor, his property and not his person is liable for the payment of the price (3). In England the liability to pay for necessities is a personal one, and it is an open question in England whether a minor can be made a bankrupt in respect of debt incurred for necessities (4). In India, however, it has been held that the law does not contemplate that an infant should be adjudged an insolvent, under any circumstances, even in respect of judgment-debts for necessities. Also, since a minor's agreement cannot be ratified, he cannot be adjudged insolvent in respect of a debt contracted by him during his minority and purporting to be ratified by him after he has come of age (5). An infant cannot be made bankrupt even on his own petition (6). If the infant is a partner in

(1) *Ex parte Blain*, (1879) 12 Ch. D. 522, 528.

(2) Section 11, I. C. A.

(3) Section 68, I. C. A.

(4) *Re Soltykoff*, (1891) 1 Q. B. 413.

(5) *Ex parte Kibble*, (1875) L. R. 10 Ch. App. 373.

(6) *Re A. and M.* (1926) Ch. 975

a firm, bankruptcy proceedings may be taken against the firm other than the infant partner (1).

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The law has been now well settled by the judicial pronouncement of their Lordships of the Privy Council in *Sanyasi Charan Mandal's Case* (2) that in no circumstances can a minor be made personally liable for debts incurred by the firm in which he is a partner, though in certain circumstances his share in the property might be made liable for payment of the firm's debts. That was a case of a joint Hindu family governed by the Daya Bhaga School, but the grounds on which the decision was based are general, and the proposition laid down there admits of general application to the case of minors. For the position of an infant in a partnership in respect of his liability for partnership debts, see *infra*.

Married Women.—In England the status of married women as regards their capacity to contract has been the subject of several Legislations ranging over a very long period. In India under the personal law of the Hindus and the Mohamadens a woman is competent to enter into a contract in respect of her separate property and can incur personal obligations like any other person. As for others who are governed by the general law their position in India has been made fairly independent by section 20 of the Indian Succession Act, 1925, and the general provisions of the Married Women's Property Act, 1882. Section 20 runs as follows. "No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." It is enacted by section 4 of the latter Act that the wages and earnings of a married woman in any employment, occupation or trade, carried on by her and not by her husband, and also any money or other property so acquired by her with the exercise of any literary, artistic or scientific skill, is to be deemed to be her separate property. Section 7 provides that a married woman may maintain a suit in her own name for the recovery of the property of any description which is in law her separate property, and she shall have in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried. Section 8 provides that if a married woman possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract. Section 9 absolves the husband from all liability in respect of obligations incurred by the wife before marriage.

It will thus be seen that for all practical purposes the position of a married woman is the same as that of an unmarried one or a widow or a man.

(1) *Lovell and Christmas v. Beauchamp*, (1894) A. C. 607.

(2) *Sanyasi Charan Mandal v. Krishnadhan Banerji*, A. I. R. 1922 Privy Council 237 on appeal from (1915) 42 Cal. 225 : 26 I. C. 836; *Jonkey Parshad v. Ghirdhari Lal*, 19 I. C. 704; *Jagmohan Narayan v. Greish Babu*, 42 All. 515 : A. I. R. 1920 All. 210 : 58 I. C. 557; *Re Sital Parshad*, 43 Cal. 1157 : A. I. R. 1917 Cal. 172 : 37 I. C. 663; *In re Hira Lal Shiv Narayan*, 97 I. C. 446 : A. I. R. 1927

S. 7. Lunatics.—In the eyes of law a lunatic is not capable of forming an intent as is contemplated by some of the acts of insolvency mentioned in section 6, unless he does so during a lucid interval (1). He can, it seems, be adjudged insolvent in respect of a debt if he commits an act of insolvency whilst sane (2). In England where a person is found lunatic by inquisition, and an act of bankruptcy is suffered after the inquisition, as where the lunatic's property in the hands of the committee appointed by the Court in Lunacy has been sold in execution of a decree against the lunatic (3), the Court in Lunacy will give leave to the committee in the name of the lunatic to consent to an adjudication in bankruptcy against the lunatic or to present a bankruptcy petition under the Bankruptcy Act (4), if it is for the benefit of the lunatic to do so. The same principles, it seems, would apply in India (5). But it is still an open question (6).

Firm and its Partners.—The word "firm" has been defined in the Indian Contract Act, as meaning a collective name for persons who have entered into partnership with one another. It is only a convenient way of grouping a number of persons under one label. A firm has no corporate personal existence, apart from that of its individual partners. Provision is, however, made in Order 30, Civil Procedure Code for suits by or against firms and persons carrying on business in names other their own.

It is expressly provided by section 119 of the British Act, 1914, and section 99, Presidency-towns Insolvency Act that any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under those Acts in the name of the firm. It has been further provided that in the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner. The Provincial Insolvency Act does not contain any such express provision. In the rule-making power of the Local Government under section 79, for carrying into effect the provisions of the Act it has been expressly provided that rules may be framed for regulating procedure to be followed where the debtor is a firm. This lends support to the view that under the Provincial Insolvency Act a firm is a debtor and can be treated as such.

The mere absence of a provision similar to section 119, Bankruptcy Act, 1914 and section 99, Presidency-towns Insolvency Act, it appears, does not make any difference. In actual practice, however, advantage has been taken of the rule making power given by section 79 and nearly all the High Courts have framed rules on the subject. Under the old Act 3 of 1907, there was no provision even as to rule-making in the corresponding section 51. Under the old Act it was accordingly held that an order of adjudication could not be made against a firm in the firm name (7). Under the present act it has been held by the Lahore High Court, relying on section 79, Provincial Insolvency Act, that even firms as such can be adjudicated (8).

(1) *Crispe v. Perrit*, Willes, 467.

(2) *Anon* (1807), 13 Ves. 590 : 33 E.R. 415.

(3) *Re Lee*, (1833) 23 Ch. D. 216 ; See also *Ex parte Cohen*, (1879) L. R. 10 Ch. D. 183 ; *Re Farnham*, (1895) 2 Ch. 799, S. C. (1896) 1 Ch. 836.

(4) *Re James*, (1884), 12 Q. B. D. 332.

(5) As to Rules under the P. I. A. see Bom. Rule 159, and Cal Rule 156.

(6) *Periammal v. Official Receiver of Coimbatore*, 1930 M. W. N. 651, per Cornish J.

(7) *Kali Charan Saha v. Hari Mohan Basak*, A. I. R. 1920 Cal. 964: 58 I.C. 531.

(8) *Mohammad Umar v. Official Receiver Rawalpindi*, A. I. R. 1929 Lah. 447: 119 I. C. 735.

Effect of adjudging a firm insolvent.—Adjudication of a firm means the adjudication of its individual members (1). The order operates as if it were an order made against each of the persons who at the date of the order was a partner in the firm. To support an adjudication against a firm, each of the partners must have committed an act of insolvency. If a joint act of insolvency is relied upon, it must be shown to be the act of all and the petition should be founded on a joint debt (2). An adjudication order may be made against the firm, though the firm is dissolved, if the debts of the firm have not been paid. So long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on. The appointment of a Receiver cannot prevent the order of adjudication being made. The Legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the court to appoint a receiver (3). S. 7.

A minor cannot be adjudged an insolvent. Where therefore a minor is a partner in the firm, the proper order to make is to adjudge the firm bankrupt other than the minor (4). Where a person carries on business in the name of the firm, a petition may be presented against him also in the name of the firm.

Joint Hindu Family.—We have seen above that a firm can be adjudged insolvent in the firms' name. The institution of joint Hindu family is peculiarly Indian. It has some resemblance to the organisation of the family with a single person as the head in Roman Law but we find no parallel to it in England. The Indian Insolvency Acts are based on English Acts and it appears that at the time when these Acts were passed into law the facts of Indian life, which are essentially different from those prevailing in England, were not given sufficient consideration. The result has been that the British Indian Courts had to experience, and they are still experiencing, great difficulty in applying legal provisions based on English law to the peculiar conditions of India. The institution under consideration has given perhaps the greatest difficulty and it is only recently that the law has been somewhat settled.

The Indian Acts provide for a firm but in England as well as in India a firm is a creature of contract and the relations of the members of the firm are governed and regulated by express agreement. In a joint Hindu family, however, the parties are placed in a definite legal relationship by birth or by natural circumstances. A joint Hindu family firm is not a firm in the sense in which that word is used in the law of partnership. (5) In *A. I. R. 1934 Cal. 810* (6), it was held that a Hindu undivided family

(1) *A. I. R. 1929 Lah. 447* supra; *Official Receiver v. Narayan Dass Lota Ram*, *A. I. R. 1926 Sind 31* : 89 I. C. 493.

(2) *Punia v. Kesarmal*, (1927) 50 Mad. 256 : 99 I. C. 185 : *A. I. R. 1927 Mad. 124*.

(3) *Gokuldass Goverdhan Dass v. Dwarkadass Goverdhan Das*, *A. I. R. 1925 Mad. 1249* : 85 I. C. 439.

(4) *Lovell and Christmas v. Beauchamp*, (1894) App. Cas. 607; *Ex parte Beauchamp*, (1894) 1 Q.B. 1; *Shah Wallace & Co.*, *A. I. R. 1927 Sind 18*.

(5) *Sanyasi Charan Mandal v. Krishnanandan Banerji*, (1922) 49 I. A. 108 : 49 Cal. 560 : 67 I. C. 124; *A. I. R. 1922 P. C. 237*; S. 5. *Indian Partnership Act, 1932*; *V. R. C. T. V. R. Chidambaram (Chettyar v. C. A. P. C. Mutaya Chettyar)*, *A. I. R. 1936 Rangoon 160*, (It was held that a joint Hindu family business is not a firm within the meaning of S. 99, Pt. I. A. 1909.)

(6) *Lal Chand Amonmal v. M. C. Boid & Co.*, 61 Cal. 975 : 152 I. C. 991.

S. 7. carrying on business is not entitled to sue as a firm under Order 30, Civil Procedure Code. The remarks of the learned judge in that case can be quoted with advantage to throw light on the matter under consideration. The suit was brought in the firm's name; it was admitted that the members were partners not because of any contractual partnership but by virtue of the fact that they were all members of a joint Hindu Mitakshara family. The learned Judge remarked.

"A firm may not be an entity known to the law as the company or a statutory corporation is known to the law, but nevertheless this term "firm" has been defined by section 239, Contract Act which by a definition of the word partnership makes it clear that agreement is necessary and says; "Persons who have entered into the partnership with one another are called collectively a firm." There may be, and no doubt are, certain elements common to a joint family business and to a partnership firm as so defined, but there are also very important distinctions. For instance, a joint family business does not involve agreement at its inception, children are born into it; nor is it dissolved by death as is the case with a contractual partnership. Another point to which my attention has been directed is that a Karta of a joint family business may sue alone in his own name on behalf of his business which is not permissible in the case of a partnership, for no one partner may sue. Either all may sue in their individual names or they may sue collectively in the name of the firm as prescribed by O. 30."

From what has gone before it follows that an insolvency petition cannot be presented against a joint Hindu family firm as such. The members of the joint Hindu family can be treated as individuals only and only those members who can be made personally liable for the debts due by the family can be adjudged insolvent (1). They are to be treated as joint debtors. The personal liability of the members has to be determined by the general provisions of Hindu law. Generally it is only the manager, whether he be the father or any other senior member of the family, who is personally liable for the debts incurred by the manager on behalf of the family. In cases where the debts are contracted for family purposes the other members of the family are liable to the extent of their shares in the joint family property only. The adult members of the family can render themselves personally liable by taking an active part in the business or otherwise (2). A minor member cannot be a partner by contract and he cannot be personally liable for debts incurred by the Hindu trading family for the purpose of the business during his minority. Even if he takes an active part in the joint family business after attaining majority, he cannot be adjudged insolvent in respect of business debts contracted during his minority (3). In the last mentioned case it was remarked.

"The words 'admitted to the benefits of the partnership' in section 247, Contract Act have been used owing to the incapacity of minors under the Act to enter into the agreement of partnership described in section 239. They do not apply to the minor members of a Hindu trading family. The interest of a minor in a joint Hindu family business, whether existing at the date of his birth or founded during his minority is acquired by virtue of his belonging to the family

(1) *N. C. Krishna Ayyar v. Pierce Leslie*, A. I. R. 1933 Mad. 64.

(2) *V. R. C. T. V. R. Chidambaram Chettyar v. C. A. P. C. Mutaya Chettyar*, A. I. R. 1936 Rang. 160. (There is a valuable discussion).

(3) *Official Assignee of Madras v. Palaniappa Chetty*, A. I. R. 1919 Mad. 690 : 41 Mad. 824 : 49 I. C. 220; *V. R. C. T. V. R. Chidambaram Chettyar v. C. A. P. C. Mutaya Chettyar*, A. I. R. 1936 Rang. 160.

and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership. Consequently such minors are not governed by sections 247 and 248, Contract Act. Further, the fact of a minor helping in the family business does not constitute admission to the benefits of the partnership within the meaning of section 247, but may be referred to his position as a minor member of the family.

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The operation of section 248 should not be extended beyond the cases which directly fall within it so as to impose on the members of Hindu family a personal obligation for debts contracted in the family business during their minority."

A. I. R. 1926 Mad. 133 (1), and *A. I. R. 1928 Lah. 354* (2) appear to lay down that a son can be adjudicated insolvent for a debt due from a father. Mr. Mulla has doubted the correctness of the Madras decision and I agree, with respect, with him. In the Lahore decision it was found as a fact that the debts were not due by the joint family, that is for which the joint family is liable. The statement of law was made as an *obiter dicta*. The court did not apply its mind to all the aspects of the question. The Madras decision was explained in *A. I. R. 1927 Mad. 922* (3), where a Hindu incurred certain liabilities and died and his son succeeded to the assets of his father and a decree against the son as representing his father was obtained, it was held that the debt is not personally enforceable, the son cannot be adjudicated an insolvent. The Lahore ruling was dissented from in *A. I. R. 1931 Mad. 788* (4). It was held there that the son of a Hindu father who dies after incurring debts on promissory notes cannot be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties. The ground of the decision was that a liability to pay the debt of the family which involves only liability to satisfy to the extent to which the family property will go cannot be held to be a personal liability involving liability of his separate or self-acquired property which is a necessary foundation for adjudication. Until there is a personal decree under section 52, Civil Procedure Code a decree, against a person as the legal representative of another does not make him liable to adjudication nor can such liability be proved in the insolvency of the legal representatives unless it is first crystallised into a personal liability in accordance with section 52, Civil Procedure Code (5). Special circumstances may, however, exist where the members of a family other than the manager may also be personally liable for family debts. For an instance see *A. I. R. 1929 Mad. 573* (6), where members of a family were found to be trading together in a joint firm and were held to be personally liable for the debts of that firm.

If he commits an act of insolvency.—Unless the debtor commits an act of insolvency the insolvency court cannot intervene in his affairs. It is the very foundation of the court's jurisdiction. It is, therefore, absolutely

(1) *M. A. R. R. M. P. Muthu Verrappa Chettiar v. U. K. Sivagurunatha Pillai*.

(2) *Paras Ram v. Amir Chand*, 109 I. C. 464.

(3) *Nagasubramania Mudali, v. K. Narasimhachariar* A. I. R. 1927 Mad. 922.

(4) (*Kalagara*) *Purnayya v. Cherukuri Basava Kottayya*, 135 I. C. 31; see also *Kalu Ram v. Gitwar Singh*, A. I. R. 1930 Lah. 592.

(5) *P. A. A. Chettyar Firm v. T. R. H. Chettyar Firm*, 12 Rang. 602 : 152 I. C. 558 : A. I. R. 1934 Rang. 162.

(6) *Somasundaram Chettiar v. Kanoo Chettiar*, 118 I. C. 494.

- S. 7.** necessary that an application for the adjudication of a debtor by a creditor on the ground that an available act of insolvency has been committed must definitely allege that an available act or acts of insolvency were committed. It is not sufficient to make some vague allegations in the petition, and then endeavour by means of evidence to prove that certain available act of bankruptcy had been committed (1). If an act of insolvency is not set out in the petition, the petition is incompetent; it is not a question of mere verbal defects coming in the way of a petitioning creditor (2). Therefore persons ought not to be adjudicated on acts of insolvency which have not been relied on by the petitioning creditor (3). In a proper case the insolvency court can however grant leave for amendment of the petition. An insolvency petition was grounded on the sale by the debtor in favour of his wife which was alleged to be nominal and collusive. Leave to insert a paragraph in the petition was prayed for that even if the court should hold that the debts referred to in the sale deed are true, the transfer was nevertheless a fraudulent preference and void as against the receiver. The amendment was allowed even though the amendment was asked for after the expiry of the period of limitation prescribed for the main proceedings (4). A petition was presented for the adjudication of two majors, four minors, and two widows as insolvents. The same having been dismissed on the ground that it was wrongly framed, the petitioner appealed and impleaded the two majors and one widow only. The petitioner alleged that those three persons incurred a joint liability and alleged certain acts of insolvency on their part. It was held that the proper procedure for the lower court was to allow the petitioner to amend his petition by striking out the names of unnecessary persons (5). A petition by a creditor for getting his debtor declared insolvent, in which it was alleged that the debtor had executed a collusive mortgage with intent to defeat or delay his creditors and which was presented within three months of the execution of the deed, was returned by the court on the ground that it was not accompanied by the mortgage deed. The petitioner was directed to refile the petition along with the necessary papers within two weeks of the order. The petitioner refiled the petition within the period prescribed by the court. An objection being raised that the petition had been filed more than three months after the date of the mortgage deed, the lower court dismissed the petition on that ground. It was held, that the order dismissing the petition was erroneous and the petitioner should not be allowed to suffer from the wrong practice of the court to which he had recourse, when it returned his petition; the petition presented for the first time being within time, the order passed by the court could not be used to the prejudice of the creditor, and the presentation of the petition along with the necessary papers related back to the date on which the original application was presented (6).

Single petition against more than one debtor.—In *Sarad Prasadukil v. Ram Sukh Chand* (7), a case decided under Chapter 20

(1) *Alagappa v. Nagindas*, 98 I. C. 431 : A. I. R. 1926 Bom. 383.

(2) *Vasanji v. Mulji*, 96 I. C. 435 : 50 Bom. 624 : A. I. R. 1926 Bom. 405.

(3) *Kondappa v. Pullapa*, 119 I. C. 46 : A. I. R. 1929 Mad. 910 (1); *Gangadhar v. Sherkhau*, 159 I. C. 529 : A. I. R. 1935 Pesh. 168; *Gobindram Kedarnath v. Parmanand Dewachand*, 153 I. C. 822 : A. I. R. 1934 Sind 177.

(4) *Balkrishnalal Jankiprasad v. Hyath Khan Saher*, 144 I. C. 44 : A. I. R. 1933 Mad. 608; see also 67 M. L. J. 924.

(5) *Ram Krishan v. Ilam Din*, 130 I. C. 783 (1) : A. I. R. 1931 Lah. 384.

(6) *Mansa Ram v. Khair Mohammad*, A. I. R. 1936 Lah. 591.

(7) 1935 S. C. 1 T. 210

Civil Procedure Code, it was held that a single application against several debtors who were jointly liable cannot be made. This case was followed S. 7. and applied to the case where the debtors were members of a joint Hindu family (1). The question as to whether partners of a firm can be proceeded against in the name of the firm under the Provincial Insolvency Act on a single petition was left open.

These cases were dissented from in 44 *Mad. 810* (2), a case decided under the Act III of 1907. Reliance was placed on section 47 (section 5 of the present Act), and the general principles of Order 1, Civil Procedure Code relating to joinder of parties and causes of action were applied. In expressing his dissent from the above-mentioned judgments Sadasivaiyar, J. made the following important observations :—

“*Kali v. Hari* (3) merely follows what the learned judges who decided that case considered to be the principle of the decision in *Ukil v. Ramsukh Chandra* (4) though they admit that the latter case was decided under chapter XX of the Code of Civil Procedure and not under the Provincial Insolvency Act. Turning to *Ukil v. Sukh Chandra* (5) Mr Justice Mukerjee who delivered the judgment of the Bench in that case merely points out several inconveniences which should arise in many cases from entertaining a single application directed against several persons to adjudicate them insolvents and the inconveniences of holding a single trial on such a petition. But I think the learned judge (with all respect) ignores that there would be grave inconveniences also in many cases in holding separate trials where the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency. The fact that section 8 of the Insolvency Act provides for consolidation on the ground of convenience even in cases where distinct petitions are obligatory shows that the argument on the ground of inconvenience should not be given too much weight. As I stated, the test is whether if the application was treated as a suit, that suit would be bad for multifariousness, that is for misjoinder of different causes of action against different defendants. If no such objections can be successfully advanced, a single application is, in my opinion, maintainable in that case. Of course, we should confine ourselves to the allegations in the petition to find out whether the objection of multifariousness is sustainable.

The above view has been followed in cases decided under the present Act. There is no legal bar to a single application being made by a creditor for adjudicating two or more persons as insolvents if they are jointly liable on a debt or have committed a joint act of insolvency. The question however whether such an application should be jointly tried and decided will depend on the facts of each case.

The proper test to be applied to such a case is to treat the petition as a suit as it should be under section 5. If the suit is bad for multifariousness, the petition should not be proceeded with. But if it is free from this defect the court should try it and if it comes to the conclusion

(1) *Kali Charan Saha v. Hari Mohan Basak*, A. I. R. 1920 Cal. 964 : 58 I. C. 531 A case decided under Act III of 1907.

(2) *Boliseti Momayya v. Kolla Kolayya*, A. I. R. 1921 *Mad.* 294 : 63 I. C. 916 : 44 *Mad.* 810.

(3) A. I. R. 1920 Cal. 964 : 58 I. C. 531.

(4) (1905) 2 C. L. J. 318.

(5) (1905) 2 C. L. J. 318.

8. that all the debtors or some of them should be adjudicated insolvents, it should pass an order to that effect (1). This principle has been applied to the case of joint debtors (2), two partners in a firm (3) and members of a joint Hindu family.

In order to sustain a joint petition against two or more persons, it is necessary that some act of bankruptcy shall have been committed by each of them. This may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy or that they should all have committed an act of bankruptcy of the same kind; and in order to support a joint petition against all the members of a firm, the acts of bankruptcy must have been committed during the continuance of the joint debt, and the petition must be founded on a joint debt (4).

Single petition by more than one debtor or creditor.—Section 13, General Clauses Act provides that in all Acts of the Governor-General in Council and regulations unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and *vice versa*. The words “debtor” and “creditor” as used in this section and section 10 may be interpreted in plural. An application by more than one debtor or creditor (5) is, therefore, competent unless it is bad for multifariousness, that is to say, for mis-joinder of causes of action or of parties. Hence a joint petition by three brothers for adjudication is competent, unless the joint petition, treated as a plaint, would be bad for multifariousness (6).

The Court may make an order.—For full notes see commentary under sections 9 and 10.

Explanation: petition by debtor is an act of insolvency.—In a petition by a creditor it is necessary that he should rely upon a particular act or acts of insolvency committed by the debtor. In a petition by the debtor the mere fact of the presentation of the petition is an act of insolvency. On the debtor's petition the court has to see only that the conditions of section 10 are fulfilled. In this connection also see section 10

8. No insolvency petition shall be presented
 Exemption of corporation, etc., from insolvency proceedings. **against any corporation or against any association or company registered under any enactment for the time being in force.**

(1) *Kalu Ram v. Gitwar Singh*, A. I. R. 1930 Lah. 592 : 126 I. C. 445.

(2) *Anant Kumar Saha v. Sadhu Charn Saha*, A. I. R. 1926 Cal. 234 : 87 I. C. 751; *Maung Kyi Oh v. S. M. A. L. Arunachallam Chetty*, A. I. R. 1925 Rang. 36 : 2 Rang. 30 : 84 I. C. 968; *Maung Hmoot v. Official Receiver, Mandalay*, A. I. R. 1937 Rang. 276; *Gadi Bhikaji v. Govindas Baunji*, A. I. R. 1937 Nag. 127.

(3) *David Sasoon and Co., in the matter of*, A. I. R. 1927 Sind 155: 100 I. C. 389; *Punniah Sagarajee Kasar Mal*, A. I. R. 1927 Mad. 124 : 99 I. C. 185 : 50 Mad. 256; *Maung Kyioh v. S. M. A. L. Arunachallam Chetty*, A. I. R. 1925 Rang. 36 : 84 I. C. 968 : 2 Rang. 309; *Muthu Veerappa Chettiar v. Siva Gurnath Pillai*, A. I. R. 1926 Mad. 133 : 49 Mad. 917; *In the matter of David Sasoon and Co., Ltd.*, A. I. R. 1927 Sind 155; *Ram Krishan v. Ilam Din*, 130 I. C. 783 (1): A. I. R. 1931 Lah. 384.

(4) *Williams on bankruptcy*, 13th edition 186; *Alamuri Punniah v. Sagarajee Kasarmal Firm*, 99 I. C. 185 : 50 Mad. 256 : A. I. R. 1927 Mad. 124.

(5) S. 9 (1) Cl. (i).

(6) *Brojendra Nandon Saha v. Nikunja Behari Das*, A. I. R. 1935 Cal. 174 154 I. C. 775; *Maung Hmoot v. Official Receiver*, A. I. R. 1937 Rang. 276.

History and analogous law.—It reproduces section 6 (6) of the Act 3 of 1907. It corresponds to sections 107 and 126 of the Pt. I. A. and Bankruptcy Act, 1914, respectively. S. 9.

Object—The reason for this section is that a joint-stock company or a limited company is governed by the special law of the Indian Companies Act, Act VII of 1913, which contains a special procedure for winding up the same in case it is carried on at a loss. In England companies are wound up under the Company (Consolidation) Act, 1908; as to limited partnerships formed under the Limited Partnerships Act, 1907, the enactments relating to bankruptcy, subject to such modifications as may be made by general rules, apply to them as if they were ordinary partnerships (1).

9. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—
 Conditions on which creditor may petition.

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Conditions on which creditor may petition.—We have seen under section 7 that an insolvency petition may be presented either by a creditor or by the debtor himself. Section 9 lays down the requisites of a creditor's petition. In order that a creditor's petition may succeed it is essential, firstly, that the debtor should have committed an act of insolvency (Section 7) (2), and, secondly, that all the conditions laid down in section 9 (i) (a), (b) and (c) should be fulfilled.

(1) Ringwood's Principles of Bankruptcy.

(2) Mohammad-Yar Khan v. Puran Purshad, A. I. R. 1935 All. 416.

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(1). These are the only conditions which the creditor should be called upon to fulfil; the court should have no concern with the petitioner's motives, or whether the adjudication is likely to benefit him (1).

The mere fact that the petitioning creditor is actuated by a motive other than the mere desire to obtain a distribution of the debtor's state in insolvency, e g., by a wish to put an end to a partnership with the debtor, does not constitute an abuse of the process of the court nor is it a fraud upon the court. Motive cannot in itself constitute fraud. Courts of justice have no concern with the motives of 'parties who have asserted a legal right (2).

Nor is it necessary in the case of a creditor, as it is in the case of a debtor, to prove that the debtor is unable to pay his debts while petitioning for adjudication (3). The rule laid down in *Muni Lal v. Hira Lal* (4), that a man can only be declared insolvent if he is not in a position to pay his debts, is not good law. Similarly a person cannot be adjudged insolvent on the mere ground that his assets are less than his liabilities. The reason is that inability to pay one's debts is not an act of insolvency (5).

Who can be a petitioning creditor.—The creditor includes a judgment creditor (section 2. The definition given there is not exhaustive. As a rule a person who can commence an action in respect of a debt against the debtor can also make a petition in insolvency. The following persons have been held to be good petitioning creditors :—

1. **Sole creditor.** If the debtor has only one creditor, he can move the insolvency court. That he has only one creditor is not a sufficient ground for saying that bankruptcy proceedings cannot be maintained against him. The reason is that in insolvency one may be able to set aside transactions and get in assets which could not be set aside or go in without an adjudication of bankruptcy (6).

2. **Incorporated company.**—A company incorporated under the Indian Companies Act, 1913 may be a petitioning creditor (7). The petition must be in the name of the company. If it is in liquidation, the petition must be in the name of the company and not of the liquidator (8). A company may petition against one of its share holders (9).

3. **Firm.**—We have seen in commentary under section 7 that a firm can be adjudged insolvent in the name of the firm. Under Order 30, Civil Procedure Code, a firm can sue and be sued in the name of the firm. An insolvency petition can, for similar reasons, be presented by a firm in the name of the firm through any one of its partners. It is, however, not competent for a partner to be a petitioning creditor in his own name in respect of a debt due to the firm

4. **Joint Hindu Family.**—A joint Hindu family is neither a firm in the sense in which it is used in the Indian Contract Act, nor is it a juristic

(1) *Gangu Veera Brahman v. G. J. and another*, A. I. R. 1935 Mad. 589 (2).

(2) *King v. Henderson*, (1898) A. C. 720.

(3) *Jamal Din v. Vishambar Dial*, 109 I. C. 578 : A. I. R. 1928 Lah. 72.

(4) A. I. R. 1933 Lah. 58.

(5) *Ma Kyin Myaing v. M. L. R. M. Muthaya Chettyar*, A. I. R. 1930 Rang 147 : 127 I. C. 373.

(6) *Re Hecquarad*, (1889) 21 Q. B. D. 71, 76.

(7) *Ex parte Dan Rylands, Re Collier*, (1891) 64 L. T. 742.

(8) *Re Winter Bottom, Ex parte Winter Bottom*, (1886) 13 Q. B. D. 446.

(9) *Re Calthrop*, (1876) L. R. 3 Ch. App. 252.

person. In respect of a petition against a debtor owing to the joint Hindu family, it is, therefore, necessary that all the persons entitled to the debt should join. The position of the members is similar to that of joint creditors. One person (the manager) can, however, take proceedings in his own name as representing the family. S. 9
(1).

5. **Executor.**—One of several executors may present a petition in respect of a debt due to the executors (1). The petition may be made before taking out probate but probate should be obtained before the order of adjudication is made.

6. **Married women.**—A married woman can, in certain cases, sue in her own name. In all cases where she can do so, she can be a petitioning creditor (2).

7. **Minor.**—A minor has a right to sue by a next friend for the recovery of a debt due to him (3). He can be a petitioning creditor (4).

8. **Lunatic.**—A lunatic so adjudged may present a petition in insolvency by a manager of his property appointed by a court.

9. **Factor.**—A factor who has sold goods to a debtor in his own name may petition against him, because he might have sued for the amount in his own name (5)

10. **Aliens.**—Aliens and denizens can be petitioning creditors whenever they can sue for the debt (6).

11. **Bankrupt.**—An undischarged insolvent can present a bankruptcy petition in respect of debts due to him which his trustee either does not or cannot claim, e.g. salaries due to him (7). An undischarged bankrupt who has obtained judgment in an action in respect of some personal wrong may present a petition in respect to the judgment debt, if the Official Assignee or Receiver has not intervened to claim the money (8).

12.—**Husband.**—A husband cannot petition alone in respect of a debt partly due to him in his own right, and partly due to his wife *dum sola* (9) or in respect of a debt due to her as executrix (10).

13. **Assignees.**—Where the assignment of a debt gives the assignee a right to sue for the debt, he may be a petitioning creditor.

14. **Trustee.**—A bare trustee may be a petitioning creditor, as where the beneficiary is under disability. But he cannot petition alone where the beneficial owner is not under any disability, and the beneficial owner must join in the petition in accordance with the time-honoured rule of the Court of Bankruptcy which required not only the oath of the person to whom the debt was legally due that he had not been paid, but also the oath of any beneficial owner capable of receiving or releasing

(1) *Ex parte Brown*, (1832) 1 D. and Ch. 118; *Ex parte Paddy*, (1818) 3 Mad. 241; 56 E. R. 498; *Treasure v. Jones*, 1 Selwyn. N. P. 253.

(2) Married Woman's Property Act, 1882, s. 7.

(3) Order 32, C. P. C.

(4) *Ex parte Brocklebank*, (1877) 6 Ch. D. 358.

(5) *Sadler v. Leigh*, (1815) 4 Camp. 195; 171 E.R. 63.

(6) *Ex parte Pascal*, (1876) 1 Ch. D. 509, and C. P. C. 1908, s. 83.

(7) *Kitson v. Hardwick*, (1872) L. R. Ch. Prac. 473.

(8) *Rose v. Buckett*, (1901) 2 K. B. 449.

(9) *Rumsey v. George*, 1 M. and S. 176.

(10) *Ex parte Megg*, 2 Gl. and J. 397.

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(1).

the debt (1). If, however, the trustee is himself beneficially entitled to part of the debt sufficient to support a petition, that is, Rs. 500 or upwards, he may present a petition on the debt without joining the beneficiary (2).

15. **Surety**—In England it was held under cases arising under the Bankruptcy Act of 1883 that a surety is a creditor and as such he can prove for his debt in the insolvency of the principal debtor (3). There were, however, certain *obiter dicta* of the judges to the contrary in the undermentioned cases (4). A surety has been held a creditor under other Acts like the Companies Act also (5). In order to remove the doubts so created, section 44, English Bankruptcy Act was amended in 1913 so as to specifically bring in a guarantor and a surety.

In India a surety was held to be a creditor in *Sethna v. Kallinji* (6). The question again arose in 1916, 32 I. C. 796 (7) as to whether a surety was a creditor for the purposes of holding a transfer in his favour to be a fraudulent preference. It was held that a surety or an accommodation acceptor is a contingent creditor entitled to prove under section 46 (1), Pt. I. A., but he is not a creditor who can be fraudulently preferred under section 56. The point was referred to a Full Bench in *A. S. Roderriques* case (8), and 32 I. C. 795 was over-ruled. The Full Bench held that a person who stands surety for the payment of a debt by the insolvent is a creditor within section 37 of Act 3 of 1907, and sale to him may be a fraudulent preference within the meaning of that section. From the above authorities it would follow that a surety is entitled to present a petition against the debtor. But he cannot petition against a co-surety for an amount claimed as contribution until he has himself paid more than his proportion of the debt due to the principal creditor, provided that the co-surety has not been released by the creditor (9).

16. **Official Assignee or Receiver.**—The Official Assignee or Receiver may present a petition in respect of a debt due to the insolvent (10).

17. **Stock Exchange Creditor.**—A Stock Exchange creditor of a defaulting member of the Stock Exchange can present a petition against him for the balance due to him, notwithstanding that the creditor has received a dividend from the Stock Exchange in the winding up of the debtor's affairs (11).

(1) *Ex parte* Culley, (1878) 9 Ch. D. 307.

(2) *Re Gamgee*, (1891) 64 L. T. 730.

(3) *Paine, in re Read, Ex parte*, (1897) 1 Q. B. 122 : 66 L. J. Q. B. 71; *Blackpool Motor Car Co., Ltd., in re Hamilton v. Blackpool Motor Car Co., Ltd.*, (1901) 1 Ch. 77 : 49 W. R. 124.

(4) *Mills, in re, Official Receiver, Ex parte*, (1888) 5 Morrel 55 : 58 L. T. 871; *Stenotyper, Ltd.*, (1901) 1 Ch. 250 : 70 L. J. Ch. 94; *Warren, in re, Trussee, Ex parte*, (1900) 2 Q. B. 138 : 69 L. J. Q. B. 425.

(5) *Ascherson v. Tredegar Dry Dock*, (1909) 2 Ch. 401 : 78 L. J. Ch. 697; *Sharp v. Jackson*, 1899 A. C. 419 : 68 L. J. Q. B. 866.

(6) (1913) 19 I. 57.

(7) *Nalam Viswanatham v. Official Assignee of Madras*, A. I. R. 1917 Mad. 681 (2).

(8) A. I. R. 1917 Mad. 39 Full Bench : 40 Mad. 783 : 38 I. C. 733.

(9) *Ex parte* Snowden (1881) 17 Ch. D. 44.

(10) *Re Bagley*, (1911) 1 K. B. 317.

(11) *Mendelssohn v. Ratcliffe*, (1904) A. C. 456.

18. **Benamidar.**—It was held by the Privy Council in 4 W. R. S, 9 46 (1), that the benamidar for the real creditor can maintain a suit for (1). the recovery of money due to the real owner. Relying on this authority it was argued in a Full Bench Calcutta case (2), case that a benamidar is competent to come in as a creditor in insolvency proceedings. In repelling this contention Mookerjee, J. remarked:—The ordinary meaning of the term “creditor” is that he is a person to whom a debt is payable. No doubt, it is open to a benamidar to maintain a suit on a money bond in his own name, although the money may have been advanced really by some one else and by the application of the doctrine of estoppel, the act of the benamidar when a suit is so instituted may conclude the real creditor ; but this does not justify the contention that the term “creditor,” as used in the Pt. I. A., includes the benamidar of a creditor. A benamidar is merely a name lender, a mask for the real owner, and is undoubtedly not in the position of a trustee ; the view cannot consequently be maintained that, although the money is established to be not really payable to the person who pretends to be a creditor of the insolvent, yet such person should be allowed to rank as a creditor in insolvency proceedings, merely because the transaction took place in his name.” The judgement can also be supported on the ground that in accordance with the time honoured rule of the court of bankruptcy which required not only the oath of the person to whom the debt was legally due that he had not been paid, but also the oath of any beneficial owner capable of receiving or releasing the debt the beneficial owner must join in the petition (3).

19. **Secured Creditor.**—A secured creditor can present an insolvency petition in accordance with terms of sub-section 2 of section 9 ; and he does not lose that right because he has obtained a decree on the basis of his mortgage on the property of the judgment-debtor (4).

20. Who are not good petitioning creditors :—

1. *Joint creditors.*—One of two joint obligees under a bond is not by himself a petitioning creditor (5). But when one of three joint-creditors had died, a petition may be presented by the two survivors (6). One of several persons who is not alone entitled to the benefit of a decree is not entitled to utilize the decretal debt so as to found upon it a petition for adjudication against the judgment-debtor. The fact that a suit has been commenced to enforce the bond is not necessarily a bar to an insolvency petition based on the bond (7).

2. *Creditors privy to act of insolvency.*—A creditor who has been privy to an act of insolvency cannot present a petition founded on that act of insolvency. Thus a creditor who has assented to, acquiesced in, or has been a party or privy to a deed of transfer by the debtor of all his property for the benefit of his creditors, cannot rely upon it as an

(1) *Gopeekrist Gosain v Gunga Persaud Gosain*, (1854-57) 6 M. I. A. 53. The same point was subsequently decided in *Gur Narain v. Sheo Lal Singh*, (1919) 46 I. A. 1 : 46 Cal. 566 : 49 I. C. 1.

(2) *Keotokey Charan Banerjee v. Sarat Kumari Debee*, A. I. R. 1917 Cal. 39 : 37 I. C. 71.

(3) *Ex-parte*, *Culley*, 1878. 9 Ch. D. 307.

(4) *Sarbhu Lal v. Mahesh Dass*, 129 I. C. 557 : A. I. R. 1931 All. 244.

(5) *Brikband v. Newsome*, (1835) 2 Mont. & A. 283.

(6) *Re W. Tucker, Ex parte J. W. Tucker*, (1895) 2 Mans. 358.

(7) *Ananta Kumar v. Sadhucharan*, 87 I. C. 751 : A. I. R. 1926 Cal. 234.

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(1) (a). act of insolvency (1), unless the transfer is fraudulent as against him, as, for instance, on the ground of a secret preference given to another creditor (2), or a misrepresentation of his assets by the debtor (3). The burden of proof of assent is on the person who alleges it (4). Proof of actual assent is not necessary if the creditor has acquiesced in the transfer by intentionally taking advantage of it (5) or otherwise by his conduct (6). Delay on the part of the creditor in presenting a petition for the adjudication of the debtor or otherwise expressing dissent from the deed of transfer may amount to acquiescence, unless the delay can be satisfactorily explained (7). Mere attendance of the creditor or his representative at the meeting which refers to the deed does not amount to approval or assent (8). A creditor who has assented to a proposed deed of transfer may revoke his assent before the deed is executed (9). Arrangements between a debtor and his creditors otherwise than in pursuance of the Bankruptcy Law are governed in England in certain cases by the Deeds of arrangement Act, 1914. There is no such Act in India.

Section 9. (a); The debt owing by the debtor to the creditor.

The expression shows that the relationship of debtor and creditor should exist between the parties. Where the petitioner alleged that the other party was in his service, realized certain debts from his debtors and embezzled the amount realized, and had taken no steps civil or criminal to recover the amount; it was held that as there was no relation of debtor and creditor between the parties the amount in question was not a debt within the meaning of S. 9 (10). The relationship is a personal one, that is to say, the debtor must be personally liable to pay the debt to the creditor. A debt which is owed by the debtor in any other capacity as, for instance, a son as the legal representative of his deceased father, or an executor or an administrator, is not sufficient to support a petition under Section 9 (11). Again it is necessary that the debt should be a good debt in law. It should be valid as well as enforceable at law. Thus a debt founded on an illegal consideration (12), or a debt barred by the law of limitation is not a good debt (13).

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- (1) *Oliver v. King*, (1851) 25 L. J. Ch. 427; *Ex parte Alsop*, (1860) 29 L. J. Bk. 7; *Ex parte Stray*, (1867) L. R. 2 Ch. App. 374; *Re Thomas Hawley*, (1897) 4 Mans. 41; *Re Brindley*, (1906) 1 K. B. 389; *Rukmani Ammal v. Rajagopala Iyer*, A. I. R. 1924 Mad. 839; (1924) 48 Mad. 294; 84 I. C. 281.
 (2) *Ex parte Marshall*, (1841) 1 M. D. & D. 575; *Danglish v. Pennant*, (1866) L. R. 2 Q. B. 49; *Ex parte Milner*, (1885) 15 Q. B. D. 605.
 (3) *Re Tanenburg*, (1889) 60 L. T. 270; 6 Morr. 49.
 (4) *Re Michael*, (1891) 8 Morr. 305.
 (5) *Re Michael*, (1891) 8 Morr. 305.
 (6) *Re Adamson*, (1894) 2 Mans. 153; *Re Woodroff*, 1897) 4 Mans. 46; *Re Sunderland*, (1911) 2 K. B. 658.
 (7) *Re Day*, (1902) 85 L. T. 238; *Re Carr*, (1902) 85 L. T. 552.
 (8) *Re Carr*, (1902) 85 L. T. 552; *Re Mills*, (1906) 1 K. B. 389; *Re Bessley*, (1913) 109 L. T. 910.
 (9) *Re Jones Bros.*, (1912) 3 K.B. 234.
 (10) *Raja Ram v. Chandi Prasad*, 138 I.C. 627 (1) : A. I. R. 1933 Oudh. 107.
 (11) *Kinderley v. Jervis*, 23 Beav. 1; *P. A. A. Chattyar Firm v. T. R. M. Chettyar Firm*, A. I. R. 1934 Rang 162; 152 I. C. 558; 12 Rang. 672; *Nagasubramania Mudaliar v. Krishnamachariar*, 50 M. 981; 104 I. C. 642; A. I. R. 1922 Mad 922; *Kalu Ram v. Gitwar Singh*, A. I. R. 1930 Lah. 592; 126 I. C. 445; *Kalagara Purnayya v. Cheru Kuri Basava Kottayya*, 4; A. I. R. 1931 Mad. 788; 135 I. C. 31; *Waman Rambhan Harathe v. Harnoom*, A. I. R. 1937 Nag 60; *Shivaji v. Samabai*, A. I. R. 1914 Sind 128; 25 I. C. 930; 8 S. L. R. 93.
 (12) *Wells v. Girling*, (1819) 1 B. and B. 447.
 (13) *Ex parte Tynte*, (1880) 15 Ch. D. 125; *Quantoock v. England*, 2 W. Bl. 704.

A bond upon which a debtor is jointly and severally liable along with other persons is sufficient to support a petition for adjudication (1). It is immaterial that the petitioning creditor may not be absolutely entitled to all the money secured by the bond ; it is enough that the bond is in his favour (2). S. 9
(1) (a).

Debt must exist at the time of Act of Insolvency. In *Ex parte* Hayward and (3) *Ex parte* Sadler (4), two English cases, it was held that the debt referred to should be in existence at the time when the act of insolvency was committed. In the former case Sir G. Mellish, L. J. observed as follows :—

“It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled not on the ground of any express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy and who happens to have no creditor or pays all his creditors in full should be liable to be made bankrupt on account of that act by some person to whom he afterwards became indebted.”

These English cases were relied upon and followed in *Chhaibar Singh v. Mr. E. M. Baines* (5). That it is so, was assumed in A. I. R. 1921 Mad. 62. (6) There a release deed was executed by a Hindu of his share in joint family property in return for consideration. The deed was registered later on when also a schedule of the properties was attached to the release deed although it was dated with the date of the release deed. In the meanwhile a certain person became the creditor of the transferor. It was held that the transfer was completed on the date on which the release deed was executed and the creditor was not entitled to apply for the adjudication of the transferor relying on the release deed as an act of insolvency committed by him. A reference to the original authority shows that the proposition that the debt must exist from the date of the act of insolvency was taken for granted and the opinion of the court was invited only on the point as to when the act of insolvency took place. The same point arose in A. I. R. 1927 Mad. 153 (7), though indirectly. The exact point before the court was as to whether it is necessary for a creditor that his debt should continue to exist upto the date of adjudication. In deciding that it is not necessary the learned judges relied upon the language of Section 9 and held that all that is necessary is that the petitioners should be creditors at the time the petition was filed. The English authority *Ex parte* Mathew (8), which holds the contrary, was not brought to their notice.

The aggregate amount of debts should amount to Rs. 500.
The debt must be not less than Rs. 500 at the date of the act

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- (1) Vallibhai Adamji, In re, 145 I. C. 619 : A. I. R. 1933 Bombay 407.
 (2) Anant Kumar v. Sadhucharan, 87 I. C. 751 : A. I. R. 1926 Cal. 231 ; Ghulam Haidar v. Mangal Sen, 98 I. C. 425 : A. I. R. 1926 Lah. 235.
 (3) 1870, 6 Ch. App. 546.
 (4) 1878, 39 L. T. 361.
 (5) Chhaibar Singh v. Mrs. E. M. Baines, A. I. R. 1936 Lah. 800.
 (6) Muthia Chettiar v. Lakshmi Narasa Aiyar, A. I. R. 1921 Mad. 62 : 61. I. C. 756.
 (7) Venkatarama Aiyar v. Buran Sheriff.
 (8) (1884) 12 Q. B. D. 506.

of insolvency ; an accretion of the costs of a suit to recover the debt, after the date of the act of insolvency, will not be sufficient (1). Statutory interest and costs on a judgment-debt become a part of the judgment-debt to make up the required amount (2). If interest has been contracted for, it may be added to the principal to make up the requisite amount, but not when it can only be recovered as damages (3).

Enquiry into the existence of the debt.—The words “debt owing by the debtor” do not imply that the debtor must admit the debt to be owing, and that unless he does so it does not follow that the insolvency court has no jurisdiction to decide whether or not the debt is owing, because it is for the insolvency court to decide whether a petitioning creditor is owed a sum exceeding Rs. 500 (4). Not only that the court has jurisdiction to decide the question but also the court is bound to make enquiry into the existence of the debt and come to a finding on the point (5). The mere filing of the insolvency petition would not amount to proof of admission of the debt due, that has to be proved in subsequent proceedings (6). In making the enquiry the court has to generally follow the procedure laid down in section 24 of the Act (7).

There is a difference of opinion as to whether the insolvency court can decline to permit the creditor to prove the alleged debts and ask him to prove them by a regular suit. The question has been answered in the negative in a Rangoon case (8). This view seems to be wrong. Section 24 or section 9 does not override the wide powers given to the court under section 4 of the Act. There may be cases when, having regard to the nature of the claim put forward by a creditor, the court may find it inconvenient to adjudicate upon the existence of the debt (9). The correct position was stated in A.I.R. 1935 Bom. 80 (10), in the following words:—“Ordinarily where a creditor presents an application, and the debtor challenges the creditor’s right to apply, the insolvency court will ask for proof from the creditor as to his right and is entitled to go into that question. But it does not follow therefrom that the insolvency court must decide every question connected with it or which may incidentally arise from it, and cannot refer the parties to a regular suit in any case, if it is of opinion that a complicated question of fact or law arises therein. In such cases the Insolvency Court has got the discretion to refer the parties to a regular suit, even though it may be that the question, if actually decided by it, would have the effect of *res judicata*.”

The debt must be a liquidated sum.—A sum is liquidated if it can be computed with certainty and the debt is liquidated if it can be ascertained in enquiry (11). To constitute a valid petitioning creditor’s debt,

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- (1) *Ex parte Sadler*, (1878) 48 L. J. (Bank) 43.
 - (2) *Re Lehmann, Ex parte Haslack*, 7 Mor. 181.
 - (3) *Ex parte Furber*, (1881) 17 Ch. D. 191.
 - (4) *Noor Muhammad v. Lal Chand*, 90 I. C. 254 : A. I. R. 1925 Lah. 436.
 - (5) *Gurdit Singh v. Mowaz*, I.R. 1932 Lah. 662; *Harke v. Kalyan Singh*, 139 I.C. 354; A. I. R. 1932 Lahore 620 (1). ; *Nathoo v. Ghulam Dustgir*, A. I. R. 1926 Lah. 688 (2) : 96 I. C. 424.
 - (6) *Imperial Bank of India v. Avanasai Chettiar*, A. I. R. 1930 Mad. 874 : 128 I. C. 518 : 53 Mad. 826.
 - (7) *Nathoo v. Ghulam Dastagir*, 96 I. C. 424 : A. I. R. 1926 Lah. 688.
 - (8) *A. K. R. M. C. T. Chetty Firm v. Maung Aung Bwint*, 68 I. C. 885 : A. I. R. 1923 Rang. 21.
 - (9) *Kanshi Ram v. Harnam*, 129 I. C. 218 : A. I. R. 1930 Lah. 602.
 - (10) *Gopikabai Mahadev Bavdekar v. Chapsi Purshottam Lahana and others*, A. I. R. 1935 Bom. 80 : 151 I. C. 566 : 59 Bom. 161.
 - (11) *U Ba Thwin and others, v. U Tun Tha*, A. I. R. 1935 Rangoon 425.

there must be a certain sum, admittedly due, and certainly payable to the person who presents the petition. It must be a certain sum in amount, or the amount of which is capable of being easily ascertained (1). A claim for damages cannot be made the basis of a petition until the damages have been liquidated (2). A claim for damages for refusing to accept and pay for goods as distinct from a claim for the price is unliquidated until the amount payable has been definitely fixed and ascertained in legal proceedings or by the agreement of parties. A plaintiff in an action for recovery of unliquidated damages is not a creditor until judgment has been signed (3). A claim for not making re delivery of shares lent by one person to another is not a debt or sum of money due or claimed to be due (4). But a claim by a lender of Government stocks against the borrower for not re-transferring the stocks may be a good petitioning creditor's debt (5).

There are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion; the latter in the old law is also called trover. In the former the suit is primarily for the return of chattel to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the chattel or its value, together with damages, if any, for its detention and the other is for a sum being its value plus the damages for its detention to be reduced to the damages only if the chattel is not returned in a certain time. In either case the option to return or to pay is in the defendant, but the court may in proper cases order the specific delivery of the chattel which the defendant must comply with on pain of contempt or it may order an issue of the writ of delivery to the sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of a chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrong dealing with it, one instance of which is the refusal to deliver upon demand, and on a decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it. In a judgment in conversion title in the property does not pass to the defendant unless and until it is satisfied (6). Mere proof in bankruptcy does not amount to satisfaction so as to pass the property (7) nor, does it seem, would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect. It is therefore not permissible for a creditor to make up the value of his debt to Rs. 500 by adding to it the value of the property in respect of a judgment in conversion. It is however open to the plaintiff that he can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and give up his claim to his property (8). *In re A debtor, Ex parte* Petitioning Creditor (9), the plaintiff obtained a judgment for the return of a cup forthwith or for payment of £ 50, its value,

(1) Robson's Bankruptcy; *Sinnam Chetty v. Alagiri Aiyar*, 77 I. C. 580: 46 Mad. 852; A. I. R. 1924 Mad. 438 (F. B.)

(2) *Re Millar*, 1901 1 K. B. 51.

(3) *R. V. Hopkins & Ferguson*, (1896), 1 Q. B. 612.

(4) *Oven v. Ruth*, (1854) 23 L. J. C. P. 105.

(5) *Alderson v. Vernor*, 1890, 3 Term Rep. 539.

(6) *Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547.

(7) *Ex parte Drake, in re Ware*, 5 Ch. D. 866.

(8) *Ex parte Drake, in re Ware*, 5 Ch. D. 866.

(9) 1907, 97 L. T. 140.

S. 9 and for £5. 5s. for damages and costs. The cup not being returned
(1) (b). he signed judgment for the full amount and issued a bankruptcy notice for non-compliance with that judgment. After that date the debtor sent up the cup to the plaintiff and on the hearing of the petition claimed that there was no longer a good petitioning creditor's debt as it ought to be treated as reduced by the value of the cup. The Court ordered adjudication and Bigham, J. said: "It has been contended that the property in the cup is still in the petitioning creditor. I think, however, that by issuing the bankruptcy notice and presenting the bankruptcy petition the creditor finally elected to abandon the property in the cup to the debtor, and that it now vests in him and will form part of the estate in bankruptcy." In A. I. R. 1924 Mad. 43 (1), the facts were somewhat peculiar. The plaintiff was the owner of a ring of the value of Rs. 1000 and he lent it to the first defendant. The plaintiff was liable to the first defendant on a promissory note for Rs. 2,500 and the first defendant was liable to the plaintiff for Rs. 2,072-8-0. being the first defendant's contribution in respect of a joint bond which the plaintiff had discharged. The first defendant assigned the promissory note to one Mika Pillai who brought an action on it against the plaintiff. On the 7th March, 1913 the plaintiff presented an insolvency petition against the first defendant and in that petition he alleged that the first defendant was indebted to him in Rs. 3,072-8 made up of Rs. 2,072-8 and Rs. 1,000 the value of the ring which he alleged the first defendant refused to return. He alleged that there was no consideration for the assignment of the promissory note to Mika Pillai and that it was a fraud on the creditors and proposed to set it off against his claim, which would thereby be reduced to Rs. 572-8. Three days after the presentation of the petition, the first defendant pledged the ring with the second defendant. The insolvency petition was heard, the first defendant not appearing, and he was on 2nd December, 1915, adjudicated insolvent; the District Judge holding that the assignment of the promissory note to Mika Pillai was fraudulent and also holding, though he gave no reasons, that the plaintiff was entitled to Rs. 1,000 in respect of his ring with the result that he became a creditor of the insolvent for Rs. 572-8 instead of being his debtor in Rs. 427-8, the difference against him in respect of the two other cross claims for Rs. 2,500 and Rs. 2,072-8.

In due course the plaintiff put in his proof for Rs. 572-8 and it was admitted. Subsequently it was alleged that he discovered that the ring was in possession of the second defendant and brought the suit for its recovery. In the later suit it was held that the order of adjudication ought not to have been made on the ground that there is no principle on which the debtor can turn himself into a creditor for the purpose of presenting an insolvency petition by setting off the value of property unlawfully detained or converted by another against a liquidated claim by that other against him, and so leave a balance due to him in respect of the dealings between them and it was also held that because it had been allowed to be done the plaintiff's action amounted to a definite election to abandon all right to the ring in favour of the first defendant.

For the purpose of ascertaining the aggregate amount of debts owing to creditors in respect of an application under section 9 the difference between contract rates of sale and purchases under a contract entered into by the debtor constitutes a liquidated sum within the meaning of clause (5) of sub-section (2). In the case the court allowed enquiry

(1) *Sinnam Chetty and another v. G. S. Alagiri Aiyar.*

(2) *Dhalan and others in the matter of A. I. R. 1919 Sind 111 T. O. 425*

to be made into the difference between the contracts of sale and purchases because it was a matter of ready calculation; but where a debt shown in insolvency was the collection of rents of paddy fields and of its mesne profits and an elaborate enquiry was necessary in order to ascertain the net amount due, it was held that the debt was not a liquidated one (1).

Where a judgment debtor in a mortgage suit in which a preliminary decree for foreclosure is passed obtains a stay of proceedings by giving security for the standing crops upto the extent of the particular amount, such amount is not a debt which would entitle the decree-holder to present a petition of insolvency against the judgment-debtor when the exact value of the crops is not ascertained at the time the petition is presented and the debt is not consequently a liquidated sum (2).

Payable either immediately or at some certain future time.—It is not necessary that the debt should be immediately payable at the time of the petition for insolvency. The expression “some certain future time” means any time in the future which is capable of being ascertained (3). A trader who takes a bill for the price of goods may petition, if the debtor commits an act of insolvency, although the bill has not matured. The act of insolvency terminates the period of credit given by the bill and the price becomes a debt payable immediately. The fact that the bill has not matured does not, in the event of an act of insolvency supervening, prevent the price from being a debt payable immediately (4).

Section 9 (1) (c).—The act of insolvency must have occurred within three months of the petition.—The commission of an act of insolvency is the very foundation of the court's jurisdiction. It is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months (5). So unless this condition is satisfied a creditor cannot make an application for insolvency simply because debts due to him exceed Rs. 500 (6). It is therefore not competent for a court to adjudicate a party insolvent for an act of insolvency not specified as in section 9, nor it is permissible for the creditor to make in his petition allegations which are not acts of insolvency within section 9 and then try to prove by evidence that as a matter of fact an act of insolvency has been committed. The petition for the adjudication of the debtor by the creditor must be definite and precise as to what available acts of insolvency were committed (7).

(1) *U Ba Thwin v. U Tun Tha*, A. I. R. 1935 Rangoon 485.

(2) *Waman Rambhau Marathe v. Harnoom and others*, A. I. R. 1937 Nag. 60.

(3) *Obitor Dictum of Odgers, J.* in *C. K. Venkatarama Aiyar v. A. Buran Sheriff*, 99 I. C. 536-50 Mad. 596; A. I. R. 1927 Mad. 153; Mulla P. 118.

(4) *Re Raatz*, (1897) 2 Q. B. 80; *Re Bear*, (1896) 1 Q. B. 616.

(5) *Kaku Chenchuramana Reddi v. Palapu Arunchalam*, A. I. R. 1935 Mad. 857; 158 I. C. 1; *Venkata Rama Lakshmayya v. Parepalli Subbarao*, A. I. R. 1937 Mad. 433.

(6) *Mohammad Yar Khan v. Puran Pershad*, A. I. R. 1935 All. 416; 157 I. C. 47.

(7) *Firm Gobind Ram Kedarnath v. Firm Parmanand Dewanchand*, A. I. R. 1934 Sind 177; 153 I. C. 822.

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(1) (c). Can the period of three months prescribed by section 9 (1) (c) be extended?—Section 54 (1) also prescribes a period of three months for adjudging certain transfers as void and fraudulent as against the Receiver. The clause under consideration and section 54 are closely connected and as a matter of fact they have been considered together in the decided cases which I proceed to discuss in detail.

For clearness and lucidity it will be convenient to consider the subject under the following headings :—

(a) Is the period of three months within which an act of insolvency must have been committed before the presentation of an insolvency petition by a creditor a period of limitation or is it a condition precedent like the preceding clause of section 9 (1) ?

(b) If it is rule of limitation, can time be extended by applying the general provisions of the General Clauses Act, (Act 10 of 1897) ?

(c) Can time be extended under the general provisions of the Indian Limitation Act, as for instance section 14 ?

(d) Can time be extended under section 78 of the Act by applying sections 5 and 12 of the Indian Limitation Act ?

(e) Can time be extended under section 143, Civil Procedure Code, which can be made applicable to insolvency proceedings by section 5 of the Act.

I shall take up all these points *in seriatim*.

(A). The leading authority is A. I. R. 1935 Mad. 857 (1). In that case the chief act of insolvency alleged in the petition was the execution of a sale deed on 28th February, 1931. This act of insolvency admittedly occurred more than three months before the date of the presentation of the petition, which was dated 29th June, 1931. The three month's period ended on 28th May, 1931, but that was during the lower court's vacation and the petition was accordingly presented on the re-opening day. The question was whether the period of three months stated in section 9 (1) (c) is a period of limitation or a condition precedent. Reliance was placed on a judgment of Krishna Pandalai, J. in 1933 Mad. Weekly Notes 1049 (2). (1). In the judgment relied upon it was held *inter alia* that the period of three months mentioned in section 54 is a period of limitation and not a condition precedent incapable of extension and a valid presentation under section 9 of the Act is valid for the purposes of the whole Act. In overruling the same judgment, the Full Bench relied upon two English cases (3), and quoted with approval the following passages from the judgments of Thesiger, L. J. in the first case and Lord Justice Giffert in the second case respectively :—

"With regard to the other point, I will assume with Mr. Winslow that the execution of the deed was an act of bankruptcy and might have been set aside as an act of bankruptcy, if any creditor had availed himself of it, in sufficient time. But no creditor did avail himself of it, and the time for doing so has passed by. What then is the position of things under the Bankruptcy Law ? It appears to me that no consequence whatever can follow from an act of bankruptcy of which the creditors might have availed themselves, if they had applied in time, but of

(1) See note 5 on p. 101.

(2) Narayana Ayyar v. Official Receiver, South Malabar, Calicut, A. I. R. 1934 Mad. 294 : 150 I. C. 339.

(3) *Ex parte Games, In re Bamford*, 1879 12 Ch. D. 814 : 27 W. R. 744 : 40 L. T. 789 ; *Allen v. Bonnett*, 1870, 5 Ch. 577 : 18 W. R. 894 : 23 L. T. 437.

which they did not avail themselves as an act of bankruptcy within the time limited by the bankruptcy Act." S. 9 (1) (c).

"It appears to me to follow from this section that where there is a deed which cannot be set aside under the Statute of Elizabeth, or generally as fraudulent—including in the term a fraudulent preference—but solely and only as being an act of bankruptcy, the lapse of twelve months before any fiat issues validates that which would otherwise be impeachable; and that if a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose."

The attention of the Full Bench was not drawn to a Division Bench ruling of the same High Court reported in A. I. R. 1932 Mad. 352 (1). There the judges were inclined to the opinion that though section 9 does not explicitly lay down any rule of limitation but in effect it does so. And the applicability of sections 5 and 12, Indian Limitation Act to the period prescribed by section 9 (1), (c) was negated not on the ground that the period prescribed is a condition precedent and not a rule of limitation but because section 78 of the Act was held inapplicable to the case of "petitions," as being distinct from "applications." It appears that had the learned judges in the Division Bench ruling been of opinion that section 78, Provincial Insolvency Act applies to petitions (including a petition under section 9) they would have most probably applied section 5, Indian Limitation Act for extending the period of three months prescribed in section 9 (1) (c). The division bench ruling, so far as it by implication goes against the rule laid down in the latter Full Bench case, must be deemed to have been over-ruled.

If the view of the Full Bench is correct it would follow that neither the relevant sections of the General Clauses Act nor the general provisions, which extend limitation, of the Indian Limitation Act can be availed of to extend the period prescribed by section 9 (1) (c).

(B) : Applicability of the General Clauses Act.—The Indian Acts follow the Bankruptcy Act of 1883 and the earlier Acts of 1849 and 1869. It was decided under the English Acts that in computing the three months the day on which the petition is presented is to be excluded, and a month means calendar month (1). Section 3 (33) of the General Clauses Act provides that month shall be a month reckoned according to the British Calendar. Notwithstanding the passages quoted from the English cases by the Full Bench referred to above, it would appear that under the English Law the period of three months is considered to be a period of limitation so far as the application of general provisions as contained in section 3 (33) and section 10 of the General Clauses Act are concerned. It is also to be noted that the Provincial Insolvency Act does not provide a period of limitation for a creditor's petition. The point is not easy of solution and there are good reasons to doubt the correctness of the rule laid down in the Full Bench case, at any rate in the unqualified and absolute manner there indicated.

Assuming that the period of three months can be a period of limitation according to one view, it follows *ipso facto* that in that case section 3 (33), section 9 and section 10 of the General Clauses Act will apply. The applicability of section 10, however, is subject to a proviso

(1) *Gangjee Premjee and Co. v. O.L.K.K.N. Firm Colombo and others*, A. I. R. 1932 Mad. 352 : 137 I. C. 740 : 55 Mad. 766.

(2) *Re Hanson, Ex parte Froster*, (1887) 4. N.orr. 98.

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(1) (c) that this section shall not apply to any act or proceeding to which the Indian Limitation Act, 1877, applies (1). In this connection reference may be made to section 145, Bankruptcy Act, 1914, corresponding to section 141 of the Act of 1883, which deals with the computation of time for doing and taking proceedings under the Act and provides *inter alia* that if the last day of the limited time falls on a day when the court does not sit, the act or proceeding shall be considered as done or taken in due time if it is done on the next day when the court sits. Section 10, General Clauses Act is analogous to section 145 of the English Act. Section 146 of the English Act has been applied to the period of three months prescribed by the corresponding provision of the English Act. This could have been done only on the assumption that a period of three months is a period of limitation and not a condition precedent. On this ground too it would appear that the period prescribed by section 9 (1) (c) should be taken as a period of limitation for the limited purpose of making the provisions of the General Clauses Act applicable to it.

(C). Can time be extended under the general provisions of the Indian Limitation Act.—Section 29 (1) (b), Indian Limitation Act, before it was amended by the Act 10 of 1922, ran as follows:—"Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." In the Act 3 of 1907 there was no provision corresponding to section 78 of the present Provincial Insolvency Act. When this was the state of law, it was held by a Full Bench (2) of the Madras High Court that recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act, on the ground that the application of the general provisions of the Limitation Act extending, in certain circumstances, the period fixed by a special law must be deemed to "affect" that period within the meaning of section 29, Limitation Act. A contrary view was taken by another Full Bench of the Allahabad High Court in *Dropti v. Hiralal* (3). This was under the old Act of 1907. When the present Act was before the legislature the attention of the latter was drawn by the Madras High Court to its Full Bench case. Possibly to avoid the hardships occasioned by the Full Bench ruling, section 78 was introduced in the new Act. Later on came the Act 10 of 1922 which substituted the following clause in place of the old clause (b) of section 29 sub section (1), I. L. A.:—"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law.

(a) The provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent of which, they are not expressly excluded by such special or local law; and

(1) P. S. Narayana Ayyar v. Official Receiver, South Alabar, I. R. 1934 ad. 294 : 150 I. C. 339.

(2) Kopparthi Lingaya and others v. Araveti Chinnaarayana and others, A. I. R. 1918 Mad. 213 : 44 I. C. 805 : 41 Mad. 159.

(3) Dropti v. Hiralal, 10 All. L. J. 3 : 34 All. 496 : 16 I. C. 149.

(b) The remaining provisions of this Act shall not apply.

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(1) (c).

By the amendment of section 29, I. L. A. the reasoning of the Madras Full Bench case has become obsolete. Section 78 of the present Act does not also expressly exclude the application of the relevant sections of the I. L. A. It expressly makes sections 5 and 12, I. L. A., 1908, applicable to appeals and applications under the Insolvency Act. By force of section 29, Indian Limitation Act the other provisions of the Limitation Act will also apply to appeals and applications in insolvency because they are not *expressly* excluded by Section 78, Provincial Insolvency Act. Other things being equal, it therefore follows that the Madras Full Bench is not good law now. For similar reasons the ruling in A. I. R. 1923 Mad. 462 (1) must be deemed to be bad law so far as it holds that section 14, Indian Limitation Act does not apply to insolvency proceedings.

(D). Can time be extended under section 78 of the Act?—Section 78 provides that sections 5 and 12, I. L. A. shall apply to appeals and applications under the Provincial Insolvency Act. The question on which the applicability of section 78 depends, is: Do the words “petition” and “application” as used in the Act mean the same thing? It has been held that these two words connote different things and section 78 is, therefore, inapplicable to a petition under section 9 (2) (c) (1) (c). In a very lucid and admirable judgment, Reilly, J. has summed up the *pros* and *cons* of the proposition in Gangjee’s case. In the use of the words “application” and “petition” in Provincial Insolvency Act there is a very definite distinction drawn between them. In the Provincial Insolvency Act, 1920, as it was enacted, petition is used for either a debtor’s or a creditor’s insolvency petition, praying that the debtor may be adjudged insolvent, but is never used for any application before the court in the course of insolvency proceedings already instituted. That “petition” should be used for applications praying that a debtor may be adjudged insolvent, which thereby institute insolvency proceedings and that all applications in pending insolvency proceedings should be described in the Act as “applications” appears to have been a deliberate choice of language. It becomes particularly remarkable when we look at sections 10 (2) and 52, in both of which the word “petition”, and the word “application” occur, “petition” being reserved as elsewhere in the Act for a petition that the debtor be adjudged insolvent. Those two sections emphasise what appears to be a deliberate contrast in the use of the two words. In section 6 (f) it is stated that a debtor commits an act of insolvency if he petitions to be adjudged insolvent. Petition is an awkward and ugly word not likely to have been used in place of the ordinary words “applies” unless there were some special reasons for using it. And the reason appears to be that even in that statement the legislature wished to maintain the distinction between a “petition” and an “application” which runs right through the Act. In 1926 a new section 54 (a) was introduced and in which the word “petition” was used for the first time for an “application” made in insolvency proceedings. The use of the word “petition” in the new section may be due to the fact that if the word “petition” was reserved purposely by the legislature for some

(1) Aiyapparaju *alias* yappa v. Veeva Venkatakrishnayya, A. I. R. 1923 Mad. 462 : 72 I. C. 488.

(2) Gangjee Premjee and Co., v. O. L. K. K. N. Firm, Colombo and others, A. I. R. 1932 Mad. 352 : 55 Mad. 766 : 137 I. C. 740 ; Bulomal Variomal and another v. Sumar Khan Allabrahkio Khan, A. I. R. 1928 Sind 177 ; R. V. Vaithianatha Aiyar and others v. Kochi S. Vaithianatha Aiyar and another, A. I. R. 1932 Mad. 112 : 135 I. C. 613 ; Ratanchand v. Smail, 149 I. C. 853 : A. I. R. 1933 Lah 891

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(1) (c) motion originating proceedings, then it might well be used in connection with proceedings under sections 53 and 54, as, though connected with insolvency proceedings and possible only while insolvency proceedings are pending, they are really new proceedings originated against outside parties. It may also be remarked that for such proceedings, so long as insolvency proceedings are going on, there is no period of limitation, and therefore the legislature may even have used the word "petition" in section 54 A advisedly, so as to make it clear that they are outside the scope of section 78.

Again, whatever explanation may be given for the use of the word "petition" in the new section 54 (a), this cannot affect the interpretation of section 78 in relation to section 9 (1) (c) because the last two sections stood when the Act was framed, and the general scheme of the Act in the use of the two words "application" and "petition" should be taken to apply to them. So much for the mere words used. According to the scheme of the Act a petition praying that a debtor may be adjudged insolvent initiates very important litigation. By section 12 of the Act it is required that such a petition should be signed and verified as if it were a plaint. And under section 18 of the Act it is provided that the procedure in regard to the admission of plaints shall be applied to such petitions. Now section 5, I. L. A., has no application to suits. As a matter of fact it is against the object of the Limitation Act that the court should have discretion to extend the period of limitation for initiating suits. If the court has power to do that then one of the main objects of the law of limitation in giving security to titles would be defeated. And in the same way, if the court had discretion to enlarge the time after an act of insolvency within which the creditor's insolvency petition must be filed the security of many transactions might be imperilled. If the court had discretion to extend the period of three months very serious results to merchants and others dealing with a judgment-debtor might happen.

In addition to the arguments put forward by Reilly, J. it may be added that section 54 and section 9 (1) (c) are very closely connected and that the word "petition" and the prescription of the period of three months in both the sections must be interpreted in exactly the same way. And on this ground the original intention of the legislature as expressed in the use of the word "petition" in section 9 appears to have been only confirmed by the use of the word "petition" in the new section 54 (a). Viewed in this light the use of the word "petition" in section 54 (a) by the legislature in 1926 is an argument in favour of and not against the proposition that a petition is distinct from an application as used in the Act. At the same time it will not be permissible to argue, just as Reilly, J. has done, that we can ignore section 54 (a) in interpreting section 78. It is a cardinal rule of interpretation that two provisions in a single Act, though apparently inconsistent, should be interpreted in such a way as to harmonise their meaning. To lay down that section 78 applies to section 54 (a) and not to sections 9 and 10 will be to introduce an inconsistency which can be defended only on the assumption that the legislature has made a mistake and disturbed the general scheme of the Act as it originally stood. To quote Lord Halsbury, "that, in fact, the language of an Act of Parliament may be founded in some mistakes, and that words may be clumsily used," I do not deny. But I do not think it is competent to any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that

does not make mistakes. It must be assumed that it has intended what it has said, and I think, any other view of the mode in which we must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament which would be attended with the most serious consequences" (1). S. 9
(1) (c).

While deciding that the words "petition" and "application" connote different things it was also decided by the same bench that petitions, so far as they are governed by the Limitation Act, are included in the word "application", and that speaking generally in regard to the Acts applicable to India, it is impossible to say that there is any necessary distinction between an application to a court and a petition to a court. It would, therefore, appear that the provisions, other than section 5 and 12, which will now apply by virtue of section 29 (b), I. L. A. to appeals and applications under Provincial Insolvency Act, will *not* also apply to petitions just as section 78 does not.

(E). Can time be extended under section 148, Civil Procedure Code.—Section 148, Civil Procedure Code provides that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired. By its express wording the section applies when a period is fixed by the court. It has no application to a case where the period is fixed by the statute (2).

Computation of the period of three months prescribed by section 9 (1) (c).—According to the section the period begins to run from the time the act of insolvency on which the petition is grounded has occurred. The word 'occurs' is not mentioned in section 6. There the word 'commit' has been used. It would therefore, seem that the act of insolvency occurs when a debtor commits it. As to when a debtor commits an act of insolvency varies with the various acts of insolvency enumerated in section 6.

Computation of three months in case of transfers.—The first three clauses (a), (b), and (c) of section 6 prescribed cases when an act of insolvency is committed by making a transfer of property. In section 54, Transfer of Property Act, it is provided that a sale in the case of tangible immovable property of the value of Rs. 100 and upwards or in the case of reversion or other intangible thing, can be made only by a registered instrument. In section 123, relating to gifts, it is provided that for the purpose of making a gift of immovable property the transfer must be "effected" by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In section 107 it is provided that a lease of immoveable property, under certain conditions, can be made only by a registered instrument. Section 59 similarly provides that where the principal money secured is Rs. 100 or upwards, a mortgage can be "effected" only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

In places where the Transfer of Property Act, 1882, is not in force, transfers of the descriptions mentioned above may be made orally or in

(1) Lord Halsbury at p. 549 of *Commissioners for Special Purposes of Income-tax v. Pense*, (1891) A. C. 531 : 61 L. J. Q. B. 265 : 65 L. T. 21 : 55 J.P. 805.

(2) R. V. Vaithianatha Aiyar v. Kochi S. Vaithianatha Aiyar, A. I. R, 1932 Madras 112 : 135 I. C. 613.

- S 9** writing. If the transfer is made in writing it requires registration under section 17 in case the conditions of the latter section are satisfied.
- (1) (c).** Where a document requires registration under section 17 and is not registered the effect of non-registration is given in sections 47 to 51 of the Indian Registration Act. Section 49, after its amendment by the Act 21 of 1929, now runs as follows :—

“No document, required by section 7 or by any provision of the Transfer of Property Act, 1882, to be registered, shall :—

- (a) affect any immoveable property comprised therein, or
- (b) confer any power to adopt, or,
- (c) be received as evidence of any transaction affecting such property, or conferring such power unless it has been registered ;

Provided that an unregistered document affecting immoveable property and required by this Act or by the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by a registered instrument”.

Section 47, I. R. A. provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. In cases of transfer the question has arisen as to whether the period of three months runs from the date of the execution of the document or from the date on which it is registered. Before proceeding to discuss the decided cases in detail a few preliminary observations needs be made. On reading sections 9 and 6 together, it is reasonable to presume that the word “occur” in section 9 has the same meaning as the word “commit” in section 6. Again the word “make” is used in section 6 clauses (a), (b), and (c). The same word has been used in sections 54 (sale) and section 107 (lease), Transfer of Property Act. In section 59 (mortgage) and section 123 (gift), Transfer of Property Act, the word “effect” has been used. Looking at the object for which the two words “make” and “effect” have been used in the Transfer of Property Act one concludes that they are interchangeable terms and bear for all practical purposes the same legal meaning. If section 6, Provincial Insolvency Act is read in the light of the various sections of Transfer of Property Act dealing with transfer of property it appears reasonable to hold that an act of insolvency is committed in all cases where a transfer is made or effected according to the Transfer of Property Act. In places where the Transfer of Property Act is not in force, section 49, I. R. A. appears to achieve the same purpose by giving the same effect to the fact of non-registration as is achieved by the more elaborate and substantive provisions of the Transfer of Property Act. It means that so far as the effect of non-registration of a document of transfer is concerned there is no difference in substance as to whether the Transfer of Property Act is in force or not in the place where the transfer occurs.

In A. I. R. 1921 Mad. 62 (1), a case governed by the Transfer

(1) M. R. P. R. S. Muthia Chettiar v. Lakshminarasa Aiyar, A. I. R. 1921 Mad. 62 : 61 I. C. 756.

of Property Act and in A. I. R. 1933 Lah. 821 (1), a case not governed by the Transfer of Property Act, it was held that the period of three months runs from the date of execution of the document and not from the date of its registration. In the later decisions of the Madras High Court (2) as well as the Lahore High Court (3) it has been held that the period runs from the date of registration and not from the date of execution. The same view has been taken in A. I. R. 1934 Rang. 216 (4) and A. I. R. 1934 Nagpur. 171 (5). S. 9
(1) (c).

The reasoning adopted in all these cases, except the Nagpur case, is that the transfer is not made because title does not pass till registration. Section 47, I. R. A. has been reconciled with section 49, Registration Act, and section 59, Transfer of Property Act and similar sections dealing with transfers on the ground that although that section throws back the commencement of the operation of the document, when registered, to the date of the execution, it does not pretend to lay down that where an instrument, which affects immoveable property requires to be registered, title in the property passes before registration is effected, and it has been held that the date of commencement of the period of the three months is the date on which the transfer sought to be set aside becomes effective in law, namely, in the case of a transfer such as mortgage or sale, the date of registration of the deed (6).

In the Lahore Full Bench case reliance was placed on section 47, I. R. A. for the view that time should run from the date of execution. With respect to it, Monroe, J., who delivered the judgment of the Full Bench, remarked :—"This argument seems to me to confuse two wholly different ideas, the operation of a document, and an event. In the present case the question is not what was the effect of the registration, *but when did the event take place which caused the transferee to become the owner.* We are not concerned with the time from which the document operated but with the time at which that document produced a legal effect, that the effect produced was by reason of section 47 retrospective in its operation does not concern us."

In the Nagpur ruling it was conceded that the mortgage was complete and valid as against the executants from the time of execution, but at the same time it was held that the period of three months begins to run from the date of registration on the ground that there was nothing to show that the creditors had any notice of the deed and in fact they almost certainly had not, and that the only notice they would have of the execution of the deed was registration.

(1) Ratan Chand and others v. Smail and others, A. I. R. 1933 Lah. 821 : 149 I. C. 853.

(2) N. R. M. M. Muthiah Chettiar v. Official Receiver of Tinnevely and another, A. I. R. 1933 Mad. 185 : 141 I. C. 101; Saravathada Iswarayya v. Kurubasubbanna and another, A. I. R. 1934 Mad. 637 (2) : 151 I. C. 1034 : 58 Mad. 166.

(3) Kirpa Ram v. Sanwala Ram, A. I. R. 1935 Lah. 55 : 158 I. C. 55; Lakhmi Chand v. Kesho Ram, A. I. R. 1935 Lah. 565 : 158 I. C. 226.

(4) U Ba Sun v. Maung San, 151 I. C. 670 : A. I. R. 1934 Rang. 216. It has now been overruled in U. On Maung v. Maung Shwe Hphaund, A. I. R. 1937 Rang. 446 F. B. where it has been held, dissenting from other High Courts, that the period of three months begins to run from the date of execution of transfer and not from the date of registration.

(5) Kanhai Lal v. Sadashiv Rao Ganpat Rao, 150 I. C. 834 : A. I. R. 1934 Nag. 171; G. W. Godbole v. Marotisa Balusa Bhaosar, A. I. R. 1937 Nag. 197.

(6) U, Ba Sain v. Maung San, A. I. R. 1934 Rang. 216 : 151 I. C. 670.

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(1) (c). The doctrine of notice on which the Nagpur ruling is based will, if adopted, be followed with very dangerous consequences. Section 9 (1) does not warrant the opinion that notice to creditors of the act of insolvency is necessary; to hold that the period of limitation runs from the date of registration and not from the date of execution on the ground of any supposed necessity of notice to the creditors is an innovation to which very few persons will subscribe. It may be readily admitted that in case it is held that the period runs from the date of execution it will be possible for the debtors to defeat the provisions of Insolvency Acts. But though registration might minimise that possibility it is an inadequate safeguard against the dishonest dodge of the debtors. Again, that is a matter for the legislature and it is not competent to a court of law to ignore the meaning and effect of express words in order to do away with legal defects in an Act. In some of the other cases referred to above also, the judges appear to have been influenced by equitable considerations. It, however, remains true that the general trend of opinion amongst all the High Courts is to decide that the starting point is the date of registration and not the execution of a document.

Against such a formidable array of authorities, as have been discussed above, one does not feel oneself to be on very sure ground in venturing to sound a note of dissent. Yet, with the greatest respect to the learned judges who have expressed themselves in favour of the proposition of law as laid down above, I submit that these decisions cannot be reconciled with the interpretation of section 123, Transfer of Property Act, section 49 and section 47, I. R. A., placed by their Lordships of the Privy Council in A. I. R. 1927 Privy Council 42 (1). That was an appeal from a Full Bench decision of the Madras High Court reported in A. I. R. 1923 Mad. 284 (2). In that case the donor of immoveable property had handed over to the donee an instrument of gift duly executed and attested and the gift had been accepted by the donee. It was held that the donor had no power to revoke the gift prior to the registration of the instrument. In this connection a Full Bench decision of the Bombay High Court reported in A. I. R. 1925 Bom. 210 (3) was cited before the Madras High Court as well as the Privy Council and approved by both of them. Lord Salvesen, who delivered the judgment of the Board, after referring to sections 122 and 123 of the Transfer of Property Act, 1882, and sections 47 and 49 of the I. R. A. as the leading statutory provisions, on which the solution of the question depends, remarked that the controversy in numerous cases in the courts of India which have dealt with this point has always centred round the words in section 123 "the transfer must be effected by a registered instrument." He referred to the Bombay Full Bench and remarked that the argument on behalf of the appellant in the appeal before the Board could not be better stated than it was in the dissenting judgments of Shah, Acting Chief Judge and Mulla, J. In order to understand the Privy Council case more fully I will quote the following passages from the judgment of Justice Mulla in

(1) T. V. Kalyanasundaram Pillai v Karuppa Mooppanar and others, A. I. R. 1927 Privy Council 42 : 100 I. C. 105 : 50 Mad. 193.

(2) Kalyanasundaram Pillai v. Karuppa Muppanar and others, A. I. R. 1923 Mad. 282 (F. B.) : 73 I. C. 206.

(3) Atmaram Sakharam Kalkya v. Vaman Janardhan Kashelkar. A. I. R. 1925 Bom. 210 (F.B.) : 49 Bom. 383 : 87 I. C. 490.

the Bombay case :—

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(1) (c).

“Reading sections 122 and 123 together, a gift is a transfer which must be effected by a registered instrument signed by the donor and attested by at least two witnesses. It follows from these two sections that a gift cannot be said to be effected unless the transfer which constitutes the gift is itself effected in the manner prescribed by section 123. In the present case there is an instrument signed by the donor and attested by two witnesses ; but before the instrument was registered, the donor declared his intention not to be bound by it, and he actually denied execution before the Registrar. The position then is this, that at the date on which the donor repudiated the transaction, there was no transfer “effected” in the manner prescribed by the law and there was no valid and complete gift ; in other words, there was no gift at all ; see the observations of their Lordships of the Privy Council in *Sadik Husain Khan v. Hashimali Khan* (38 All. 627) where their Lordships said that transfer within the meaning of section 122 meant *prima facie* a valid transfer. It is true that in the present case the donor did “all that he need do” towards completing the gift, namely, that he executed the writing and handed it to the donee but it cannot be said, having regard to the language of section 123, that, because he did so, there was a transfer effected by way of gift ; for a transfer by way of gift under that section can only be effected by a registered instrument. It is also true that having regard to the provisions of the Indian Registration Act the registration could be effected without the co operation of the donor and even against his consent and further, that on the instrument being registered, it operates from the date of its execution as distinguished from the date of registration, but it cannot be inferred from this that a transfer by way of gift had been effected in the manner prescribed by section 123 before the date on which the donor drew back from the transaction. It is also true that when the donor executed and handed over the document to the donee there was a clear intention expressed on his part to give, and a clear intention on the part of the donee to take, but that does not conclude the case. The intention must be expressed in the manner prescribed by law, that is, by a registered instrument signed by the donor and attested by at least two witnesses..... It seems to me that the registration prescribed by section 123 is not mere evidence of the gift, but is part of the gift itself. It is, I think, a necessary part of the proposition that the gift has been effected. It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift.”

In regard to these arguments the Privy Council remarked as follows :—

“*Their Lordships however, cannot accept them. They are unable to see how the provisions of section 123 of the Transfer of Property Act can be reconciled with section 47, Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place.* When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done every thing in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by the law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having necessary interest within the prescribed period. Neither death, nor the express revocation by the

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(1). donor, is a ground for refusing registration, if the other conditions are complied with. Their Lordships accordingly find themselves in complete agreement with the judgment of the Full Bench of the Bombay High Court in the case cited. As this decision, and the similar decision of the Full Bench of the Madras Court, had settled the law for these Presidencies it is unnecessary to refer to the various conflicting decisions of inferior tribunals which were overruled. Their Lordships apprehend that the judges of the Madras High Court, in allowing leave to the appellant in the present case to proceed with his appeal, desired to elicit an authoritative opinion as to the soundness of the two latest decisions in the Madras Court and their Lordships think it desirable that a point which has occasioned so much controversy in the past should be settled by a decision, which will apply to the whole of India."

If that is the law in places where the Transfer of Property Act is in force it must, by necessary implication as well as by the express words of the Privy Council judgment, be true of places where the Indian Registration Act only and not the Transfer of Property Act is in force. It is so because the wording of section 17, I. R. A. is not stronger than the language used in sections 54, 123 etc., of the Transfer of Property Act.

It is unfortunate that the above judgment of the Privy Council was not brought to the notice of, and no argument was based thereon before, the learned judges of the Madras, Lahore and the Rangoon High Courts. It was cited before the Nagpur Court but it was distinguished on grounds which do not appear to be in accord with law. The construction of section 47, I. R. A., which has been relied upon for holding that title is not complete from the date of execution but on the date of registration and that what takes legal effect on the date of registration is simply made retrospective to operate from an earlier date by virtue of the express wording of section 47 is, in my opinion, inconsistent with the construction placed by Their Lordships of Privy Council. Special attention needs be drawn to the lines which are italicized in the above passages from the Privy Council's judgment. The view of the Privy Council becomes very clear when it is read in the light of Justice Mulla's dissenting judgment (1).

The transfer is said to have occurred within section 9 (1) (c) on the date when the actual transaction takes place and not on the date of mutation of names (2). But where the mortgage was executed beyond three months but the mortgagee took possession within three months of the application, it was held that the transfer took place before three months of the application (3).

As regards the starting point for the period of three months in cases of other acts of insolvency mentioned in section 6 refer to the appropriate headings under that section.

Amendment of creditor's petition.—Order 6; rule 17, Civil Procedure Code, gives ample powers to the courts for allowing amendments of petitions and the amendment may be allowed even after the expiry of three months to cure a formal defect. Where a petition presented by a bare trustee was dismissed on the ground of non-joinder of the

(1) The Privy Council view has been, since the above was written, followed in *H. On Maung v. Maung Shwe Hphaund*, A. I. R. 1937 Rang. 446 F. B.

(2) *Nur Mahommed v. Lal Chand*, 90 I. C. 254 : A. I. R. 1925 Lah. 436 ; *Aminchand v. Dunichand*, A. I. R. 1936 Lahore 923

(3) *Mahomed Hashan & Co, In re*, 75 I. C. 203 : A. I. R. 1923 Bom 107 ; *Sulaman Hajee Mohamed Bros. v. Hajee Ahmad Haji Essak*, A. I. R. 1937 Rang. 16.

cestui que trust the Court of appeal gave leave, more than 3 months after the presentation of the petition, to amend by adding the *cestui que trust* (1). But after three months from the date of the act of bankruptcy a petition will not be amended by adding a fresh petitioner or a fresh debt (2), or a new act of insolvency which took place more than three months before the amendment (3). In the English case it was held by a Divisional Court consisting of Vaughan Williams and Wright, JJ. that a petition will not be allowed to be amended by adding a petitioner after three months from the date of the act of bankruptcy. At page 197 Vaughan Williams, J said :—

“ It is perfectly clear that the court ought not to allow, after three months have elapsed from the date of committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors who could not themselves present a petition.”

And a little further on he observed :—

“ Our attention was called to several cases which, it was said, established that the power of amendment could be exercised after the three months had elapsed. In all those cases, however, it will be seen that the person added was not essential to the petition by virtue of the requirement of the Act, but only by virtue of the rules of practice of the bankruptcy court.”

At page 195, in a remark made by the learned judge in the course of the argument, he again refers to the difference between allowing the amendment in order to conform to some rule of practice and of allowing an amendment which would have the effect of dispensing with the statutory requirement that the creditor's petition must be filed within three months of the act of bankruptcy. This distinction was again emphasised in *Re A Debtor* (4), where a petition not properly attested under the rules of practice was allowed to be amended, Wright, J., observing : “ This was not like a case where a new petitioning creditor is added.” It would therefore, follow that where there is no valid petition to the court, it cannot be validated by adding a new debt or a new creditor. The principle enunciated in *re Maund's* case will not also apply to cases where fraud and collusion between the alleged insolvent and the petitioning creditors are pleaded (5).

Effect of section 16, Provincial Insolvency Act on the rule laid down in *re Maund's* case.—Section 16 provides that where the petitioner does not proceed with diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted, in the amount required by this Act in the case of a petitioning creditor. The section presumes that there is already a valid petition before the court. It does not purport to override the express provisions of section 9 (1) (c). In A. I. R. 1928 Mad. 608 (6), A. I. R. 1929 Rang. 291 (7) and in A. I. R.

(1) *Ex parte* Dearle, (1884) 14 Q. B. D. 184 ; *Re* Ellis, 4 Mor. 283.

(2) *Re* Maund, (1895) 1. Q. B. 194.

(3) *Gobindram Kedarnath v. Parmanand Diwanchand*, 153 I. C. 822 : A. I. R. 1934 Sind 177.

(4) *Re A Debtor*, 1902, 86 L. T. 688.

(5) *In re* Maugham, (1888) 21 Q. B. D. 21.

(6) *Venkata Hanumantha Rao v. Yerugulapati Gangayya* A. I. R. 1928 Mad. 608: 51 Mad. 594: 110 I. C. 611

(7) *L. C. T. R. M. Sathoppa Chettyar and another v. A. S. Chettyar Firm and others*, A. I. R. 1929 Rang. 291 ; 7 Rang. 785. : 122 I. C. 258.

- 5.9 (2). 1932 All. 147 (1) new creditors were substituted in place of original petitioning creditors. None of these cases is, however, against the rule as in all those cases the original petition was validly presented. Section 16 is copied from section 107 of the English Acts of 1883 and 1914. And under the English law it was held that section 107 should not be exercised in a way as to nullify the effect of section 9 (1) (c).

In *In re Maund's* case certain creditors had filed a petition on 16th May, 1894, alleging that an act of bankruptcy had been committed on 5th March, 1894. On 15th June an application to add the names of two other persons as petitioning creditors was made. The reason for that application being that there was doubt whether the amount of the debts due to the creditors who had filed the petition was sufficient to entitle them to present the petition, and reliance was placed on section 107; but the learned judge said that the power ought not to be exercised after the lapse of three months from the date of the act of bankruptcy. The reason was that it was desired by the exercise of the power to remedy a defect, which might invalidate the filing of the petition itself. The Indian decisions are discussed in detail under section 16.

Sub-Section 2 ; Petition by a secured creditor.—The reason of the rule is that a petitioning creditor in insolvency must be an unsecured creditor, that is to say, he must be a creditor who either never had a security or, if he had one, has given it up or valued it, asserting it to be less in value than the debt, and who presents his petition as being well-founded upon the balance of the debt after setting off the value of security, and that balance must amount to Rs. 500 (2). The mere fact that he has obtained a decree on the basis of his mortgage will not preclude him from making the application (3). A secured creditor, who omits in his petition either to state that he is willing to give up his security or to give an estimate of its value, does not thereby forfeit of the benefit of his security; the only result is that an adjudication made on such a petition would be bad (4). A omission through inadvertence to mention a security which is of little or no value (5), or the omission of a statement in the petition that the creditor is willing to give up the security (6), or the omission to state the fact that the petitioning creditor is a secured creditor and the value of security is a defect which can be cured by amendment of the petition (7).

If the estimate is a real one and not a mere sham the court will not on the hearing of the petition go into the question of its correctness. But when the creditor comes to prove for dividend, he will be bound by the estimate in the absence of mistake (8). If he does not prove the Official Assignee or Receiver cannot compel him to hand over the security on payment of the estimated value (9).

(1) (Bohra) *Ganga Nath and others v. Kunwar Zaim Singh and another*, A. I. R. 1932 All. 147 : 54 All. 72: 135 I. C. 250.

(2) *Moor v. Anglo Italian Bank*, (1879) 10 Ch. D. 681 689.

(3) *Sarbhu Lall v. Mahesh Dass*, 129 I. C. 557 : A. I. R. 1931 All. 224.

(4) *Moor v. Anglo Italian Bank*, *supra*; *Bank of Upper India v. Administrator General of Bengal*, (1918) 45 Cal. 653, 663-664: 47 I. C. 529 : A. I. R. 1919 Cal. 908.

(5) *Re A Debtor*, (1922) 2 K. B. 109.

(6) *Ex parte Venderlinden*, (1882) 20 Ch. D. 289.

(7) *T. Mahomed Ayyab Sahib v. G. F. Gunnis & Co.*, A. I. R. 1914 Mad. 687 : 37 Mad. 555 : 19 I. C. 19; See also *Ahamed Mahammed Parulke v. Prapullanath Tagore*, 61 Cal. 924 : 154 I. C. 524 : A. I. R. 1935 Cal. 84.

(8) *Re Button*, (1905) 1 K. B. 602; *Ex parte Taylor*, (1884) 13 Q. B. D. 128; *M. E. Moola & Moolla & Sons, Ltd. v. Chartered Bank of India*, (1927) 5 Rang. 685 : 107 I. C. 860 : A. I. R. 1928 Rang. 36.

(9) *Re Vautin*, (1899) 2 Q. B. 541.

Appeal ; necessary parties.—It is not necessary for an appellant to make other creditors who joined with him in the original petition of adjudication, parties to appeal if the debt which, he states, as owing to him, is more than Rs. 500 (1) In an appeal by a creditor from an adjudication order the insolvent is a necessary party (2). S. 10.

Miscellaneous—In A. I. R. 1933 Lah. 642 (2) the question was raised but not decided as to whether there is an obligation on the petitioning creditor to implead other creditors and whether he only has to comply with the requirements of sections 9 and 13 (2), neither of which demands the impleading of other creditors (3). Where an application made by a debtor for insolvency was rejected as also the adjudication as insolvent of the debtor, whereupon another creditor made a similar application, it was held that the dismissal of the previous application did not operate as *res-judicata* in the later proceeding though the second applicant was a party to the first application (4). Where a mortgage transaction is effected between the debtor and his own son-in-law at a time when the debtor is involved heavily in debt and within three months of the application for his being declared an insolvent the presumption that the mortgage was to defraud his creditors is very naturally raised against him (5).

10. (1) A debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts and—

- (a) his debts amount to five hundred rupees ; or
- (b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money ; or
- (c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property.

(2) A debtor in respect of whom an order of adjudication whether made under the Presidency-towns Insolvency Act, 1909, or under this Act has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case

(1) *Jamal Din v. Bishambar Dial*, 109 I. C. 578 : A. I. R. 1929 Lah. 72.

(2) *Chhotubhai Bhimbhai v. Dajibhat Ukabhai*, 80 I. C. 482 : A. I. R. 1924 Bom. 472.

(3) *Lorind Chand Parma Nand v. Mahomed Akram Khan*, 145 I. C. 474 : 34 P. L. R. 827 : A. I. R. 1933 Lah. 642 (2).

(4) *Chauthmal Bhagirath v. Khem Karam Das*, 107 I. C. 842 : A. I. R. 1928 Pat. 116.

(5) *Amir Chand v. Official Receiver Mianwali*, 134 I. C. 1108 : 32 P. L. R. 637 (2) : A. I. R. 1931 Lah.

S. 10 may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

History.—The earliest law of insolvency applicable outside the Presidency towns was contained in chapter 20 of the Civil Procedure Code, Act 10 of 1877. Section 351 of the Code ran as follows :—

“If the court is satisfied—

(a) that the statements in the application are substantially true ;

(b) that the applicant has not, with intent to defraud his creditor, concealed, transferred or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned or at any subsequent time ;

(c) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property ;

(d) that he has not committed any other act of bad faith regarding the matter of the application ;

The court may declare him to be an insolvent and may also, if it thinks fit, make an order appointing a Receiver, or if it does not appoint such Receiver, may discharge the insolvent.”

For the Punjab the law was contained in sections 22 to 33 of the Punjab Laws Act, 1872. For our present purposes all that we need notice is that under the Insolvency Chapter of the Code of Civil Procedure the court had to satisfy itself that the statements in the application of the debtor were substantially true and also that the debtor had not committed any act of bad faith prescribed in clauses (a), (b), (c) and (d) of section 351, which practically brought under review the whole conduct of the debtor in his trade or business. It is also to be noticed that the words used are that the court may declare him to be an insolvent and not that the court shall declare him to be an insolvent. Under the Civil Procedure Code it was held in *Salamat Ali v. Minahan* (1) that, notwithstanding the use of the words “may declare” in section 351, if a person making an application to be declared an insolvent had not brought himself within clauses (a), (b), (c) and (d) of section 351, then the court had no discretion to refuse his petition on other grounds. The expression “any act of bad faith regarding the matter of the application” used in clause (d) of section 351 was also interpreted as embracing the insolvency and all the facts and circumstances material to explain the insolvency, and acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency, were held to be part of the matter of the application (2).

Then came the Act 3 of 1907 which repealed sections 22 to 32 of the Punjab Laws Act, 1872, and section 341 clause (e), and chapter 20 (sections 344 to 368) of the Code of Civil Procedure, 1882. The law was considerably enlarged and the Act represented an endeavour on the part of the Legislature to enact a more comprehensive and a more complete code for insolvency administrations outside the Presidency towns. Section 6 sub-clause 3 provided that the debtor shall not be entitled to present an insolvency petition unless :

(1) I. L. R. 4 All. 337 ; *See Jowala Nath v. Parbatty Bibi*, 14 Cal. 691.

(2) *Bavachi Packi v. Pierce, Leslie and Co.*, I. L. R. 2 Mad. 219 ; *Gopal Das v. Behari Lal*, I. L. R. 17 All. 218.

- (a) his debts amount to five hundred rupees ; or
- (b) he has been arrested or imprisoned in execution of the decree of any court for the payment of money ; or
- (c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property. Section 11 clause 1 (a) required that every insolvency petition presented by a debtor shall contain a statement that the debtor is unable to pay his debts. Section 14 sub-section (1) provided that on the day fixed for the hearing of the petition the court shall require proof, among other matters, that the creditor or the debtor, as the case may be, is entitled to present the petition. Section 15 sub section (1) enacted that where the court is not satisfied with the proof of the right to present the petition..... or that for any other sufficient cause no order ought to be made, the court shall dismiss the petition. Where the petition is not dismissed under the preceding section, it was provided by section 16 sub-section (1) that the court shall make an order of adjudication, and on the making of an order of adjudication the insolvent, if imprisoned for debt, shall be released. Section 44 clause (1) provided that a debtor may, at any time after the adjudication, apply to the court for an order of discharge.

The above brief summary of the main provisions of the Act 3 of 1907 will show that the new Act altered the law as it existed under the Insolvency Chapter of the Code of Civil Procedure in the following particulars :—

1. The misconduct of the debtor did not come under review before an order of adjudication under the Act 3 of 1907, but it did under the Civil Procedure Code (1).

2. Though section 11 sub-section (1) (a) required that the debtor should in his application give a statement that the debtor is unable to pay his debts, section 14 sub-section (1) did not require that the statements in the application should be substantially true as a condition precedent to the passing of an order of adjudication.

3. The effect of an order of adjudication under the Act 3 of 1907 was that the insolvent got an automatic protection from arrest in execution of decrees passed against him, independently of the insolvency court.

The Act 3 of 1907, instead of improving matters, made them rather worse for the creditors. The court could not go into and investigate the affairs of the debtor leading to insolvency before making an order of adjudication and the debtor was not required to prove that he was unable to pay his debts in full as a condition precedent to entitle him for an order of adjudication. The misconduct of the debtor could be gone into by the insolvency court only when the question of granting a discharge came before the court and this was left to the debtor's sweet will, as section 44 subsection (1) did not make it obligatory on the debtor to apply for discharge nor section 16 sub-section (1) provided for fixing any time within which the debtor was to apply for discharge. The advantage which the debtor got by an order of adjudication was that he got an automatic protection from arrest. The result was that under the Act 3 of 1907 a debtor stood to gain much and lose nothing by coming in the insolvency court. Whenever he was pressed or harrassed by his creditors for the payment of their debts he could go and seek the protection of the insolvency court, without running the risk of his

S. 10. misconduct being investigated at any stage of the insolvency proceedings. Instead of applying for discharge in the first insolvency it was almost invariably more convenient for the debtors to present a second application for insolvency. The creditors before the first order of adjudication could not get their debtors arrested so long as the order of adjudication stood and the creditors who lent money after the first order of adjudication were similarly defeated by obtaining a second order of adjudication on his second petition.

In actual working the Act of 1907, to say the least, brought about a highly unsatisfactory state of affairs. All possible means within the statute were explored by the courts in India to remedy and to minimise the effect of the defects in the Act; and for the purpose resort was had to the English law under which an application of insolvency can be dismissed whenever the court finds that it is an abuse of the process of court. Under the Act it was held in some cases (1) that the court could dismiss the insolvency petition under section 15 (a) for any other sufficient cause. This view was, however, subsequently dissented from (2). It was held that the latter part of sub-section 1 of section 15 of the Indian Act has no reference to an insolvency petition presented by a debtor. It reproduces almost word for word section 7 sub section 3 of the English Bankruptcy Act of 1883, which plainly refers to an insolvency petition presented by a creditor only.

What the court could not do under section 15 sub-section (1) it did under the inherent jurisdiction of the court, relying upon the law in England. It has been held in England, both under the Act of 1869 and under the Act of 1883, that an insolvency petition, whether presented by a debtor or by a creditor may be dismissed, if it has been presented, not with the *bona fide* object of obtaining adjudication but for an inequitable or collateral purpose. In England the power to dismiss such petitions has been regarded as inherent in the court. It may be that the Indian courts have similar authority under section 47 of the Act of 1907, read with section 151, Civil Procedure Code. As early as 1914 it was held by a Full Bench of the Allahabad High Court in *Triloki Nath v. Badri Das* (3), that the court can dismiss the debtor's petition on the ground of an abuse of the process of the court. This was prior to the Privy Council ruling in *Chattarpal Singh's case* (4). In this case the Calcutta High Court had dismissed the debtor's petition for adjudication on the ground of abuse of process of the court. In reversing the judgment it was held by the Judicial Committee that the Provincial Insolvency Act entitles a debtor to an order of adjudication when its conditions were satisfied, that this does not depend on the court's discretion, but is a statutory right, and a debtor who brings himself within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the court, and that any misconduct of a debtor is to be visited with its due consequence at the time of the debtor's application for discharge and not on the initial proceedings.

(1) *P. L. T. A. L. Arunachalam Chetty v. Maung Po Thin*, 4 Bur. L. T. 17 : 9 I. C. 461.

(2) *Girwardhari v. Jai Narayan*, 7 I. C. 39 : 7 A. L. J. 885 : 32 All. 645 ; *Udaichand Maity v. Ramkumar Khara*, 7 I. C. 394 : 15 C. W. N. 213 : 12 O. L. J. 400 ; *Samiruddin v. Kadar Mayee Dassi*, 7 I. C. 691 : 12 C. L. J. 445 : 15 C. W. N. 244 ; *Tunya v. Subbaya Pillay*, 18 I. C. 500 ; see also 5 B. L. T. 277, 6 L. B. R. 146, 12 I. C. 48 and 14 I. C. 570.

(3) *A. I. R. 1914 All. 17* (2) : 36 All. 250 : 12 All. L. J. 355 : 23 I. C. 4.

(4) *Chhatapat Singh Dugar v. Kharag Singh Lachmiram and others*, A. I. R. 1916 Privy Council 64.

The Act 3 of 1907 was replaced by Act 5 of 1920, the Act which is in force now. In the present Act advantage was taken of remedying the defects which were found in the working of the old Act. Inability to pay his debts was made a condition precedent to entitle the debtor to present an insolvency petition and the scope of enquiry for recording a finding on the point was defined by the addition of a proviso to section 24 of the present Act which corresponds to section 14 of the old Act. Section 15, clause 1, was reproduced in section 25 and it was made absolutely clear that the words "for any other sufficient cause" apply to a creditor's petition only. Section 16, clause 1, which found its place in section 27 of the present Act, was amended by providing that at the time of making an order of adjudication the court shall specify in such order the period within which the debtor shall apply for discharge. Further, a new section, section 43, was added. It authorised the court to annul the order of adjudication on the debtor's failure to apply for discharge within the specified time or to prosecute the same in case one is made. Section 16, sub-section 2 (b) giving automatic protection to the debtor under the old Act was omitted and a new section, section 31, was added making the giving of protection discretionary with the insolvency court. Section 10, sub-section 2 was also newly added to prevent the abuse of the process of court, which had given so much trouble under the old Act. By the enactment of this sub-section a debtor cannot now apply for the second time in insolvency where an order of adjudication has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, without the leave of the court by which the order of adjudication was annulled, such leave to be granted only in certain conditions mentioned in the section. The scope of this sub-section was widened by Act 11 of 1927 by the substitution of the words "whether made under the Presidency-towns Insolvency Act, 1909, or under this Act" in place of the words "made under this Act." Even in the Act of 1920 the court was not given power to annul an order of adjudication made on an application which did not lie under section 10, sub-section 2. This power has now been conferred by section 35 of the Act 11 of 1927, by amending section 35. For that see section 35. S. 10.

Under the present Act it may be taken that two propositions are well established :—(1) that the second application does not lie if it is barred under section 10, sub-section 2 ; and

(b) that cases which do not fall within the sub-section will continue to be governed by the rule laid down in Chhatarpal Singh's case, that is to say, the court is bound to adjudicate a person if he satisfies the conditions of section 10 and his application cannot be refused on the ground that there has been an abuse of the process of the court.

The law under the Presidency-towns Insolvency Act, 1909. Section 14 prescribes the conditions on which a debtor should petition and inability to pay debts is not one of them. Section 14, sub-section 2 which is the same as sub-section 2 section of 10, Provincial Insolvency Act, was added by the Act 11 of 1927. The defect, which existed, was remedied for the Presidency-towns in 1927 whereas it had been done in 1920 for the Muffossil. Section 15 (1) provides that a debtor's petition shall allege that the debtor is unable to pay his debts, and if the debtor proves that he is entitled to present a petition, the court may thereupon make an order of adjudication unless in

- S. 10. its opinion the petition ought to have been presented before some other court having insolvency jurisdiction. By the Act 11 of 1927 courts under the Presidency-towns Insolvency Act were also given power to annul the adjudication made on an application presented without the leave of the court under sub-section 2.

In *Mal Chand's* case, (1) which was decided before the Privy Council case, *Chhatarpat Singh v Kharaag Singh Lachminarayan*, it was held that it is not obligatory upon a court to grant an application in insolvency merely because the debtor satisfies the court that the conditions mentioned in sections 14 and 15, Presidency-town Insolvency Act, exist in a case and that it is the duty of the court to consider whether the application for insolvency constitutes an abuse of the process of the court. It was also held that an insolvency court has jurisdiction to make an order annulling an adjudication, if it thinks that the application for insolvency was an abuse of the process of the court, under section 21. In interpreting section 21 and holding the above view generally the undermentioned cases were followed. (2) This case was followed in 1923 in Ballav Chand Serowjee's case (3) in which the Privy Council ruling in Chhatarpat Singh's case was distinguished on the ground that the facts of that case were quite different from the case before it. Mr. Mulla's opinion on the Calcutta view is the same and it is supported by him on the following grounds:—"The case before the Privy Council was one under the Provincial Insolvency Act, 1907. It is provided by that Act that in the case of a petition presented by a debtor, the court shall dismiss the petition if it is not satisfied that he is entitled to present the petition, and if the petition is not dismissed, the court shall make an order of adjudication. The language of section 15 of the Presidency-town Insolvency Act is different. That section says that "If the debtor proves that he is entitled to present a petition, the court may make an order of adjudication." The words used being "may" and not "shall" as in the Provincial Insolvency Act, the court has discretion under the Presidency-town Insolvency Act to refuse to make an order of adjudication even if the conditions which entitle the debtor to present a petition are complied with." Against this view it may be submitted that under section 351 of the old Civil Procedure Code the word 'may' was used and yet it was uniformly held that the court could not refuse to adjudge a person insolvent if his case did not fall within any of the clauses mentioned therein. The view under the Civil Procedure Code could, however, be supported on the ground that by expressly mentioning cases where it could not pass an order of adjudication, the Legislature by implication had taken away the court's jurisdiction to refuse an order of insolvency on a debtor's application in any other case not falling within those specifically dealt with in the section itself. Whatever it may be, we have to take the law as it stands and is decided by the courts. The law under the Presidency-towns Insolvency Act is, therefore, different from that under the Provincial Insolvency Act inasmuch as the inherent jurisdiction of the courts under the former Act to dismiss a debtor's application on the ground of abuse of process of court in cases, which are not governed by sub section 2 of section 14 Presidency-town Insolvency Act, exists, but courts under the latter Act have no such power because of the Privy Council's ruling referred to above.

(1) *Mal Chand v. Gopal Chand*, A. I. R. 191 Cal. 117.

(2) *In re Betts, Ex parte Official Receiver*, (1901) 2 K. B. 39 : 70 L. J. K.B. 511 ; *In re Hancock, Ex parte Hillearys*, (1901) 1 K. B. 535 : 73 L. J. K. B. 245 ; *Ex parte Painter, In re Painter*, (1895) 1 Q. B. 85 : 64 L. J. Q. B. 22 ; *In re Archer, Ex parte Archer*, (1904) 20 T. L. R. 390.

(3) A. I. R. 1923 Cal. 703.

Amendment of the section in the Punjab.—In section 10 (1) of the Provincial Insolvency Act, 1920, after the existing clause (a) the following clause shall be inserted :—

“(aa) his debts amount to two hundred and fifty rupees, and he satisfies the court that he is entitled to summary administration of his estate under section 74 of this Act ; or” (1).

Essentials of section 10, sub-section 1.—A debtor is not entitled to present an insolvency petition unless—1. He is unable to pay his debts *and* 2 (a) His debts amount to Rs. 500-0-0; (b) *or* he is under arrest or imprisonment in execution of a decree for the payment of money ; or (c) an order of attachment in execution of a decree for the payment of money has been made, and is subsisting, against his property.

In all cases he must prove that he is unable to pay his debts. If he succeeds in proving that he is unable to pay his debts and any *one* condition of those mentioned in (a), (b) and (c) his petition lies and an order of adjudication is sure to follow thereupon.

Adjudication is a statutory right.—The leading authority is the pronouncement of their Lordships of the Privy Council in Chatarpat Singh's case (2). The following passage from the judgment will bear quotation :—

“The dismissal of Chhatarpat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too that the High Court dismissed the appeal ; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right ; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an abuse of the process of the Court. This case illustrates the peril of this doctrine in India, for what has been treated by the courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of insolvency. Be that, however, as it may, Their Lordships are now concerned only with the debtor's position and as to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has been rightly held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding.”

The above Privy Council ruling has been since followed in many

(1) Section 3, The Punjab Relief of indebtedness Act, VII of 1934.

(2) Chhatarpat Singh Dugar v. Kharag Singh Lachmiram and others, A. I. R. 1916 Privy Council 64.

cases (1). It is now settled law that if a debtor satisfies the conditions mentioned in section 10, the court cannot refuse an order of adjudication against him on any other ground.

Unless he is unable to pay his debts.—These words are new and were added to make it clear that a debtor is entitled to present an insolvency petition only if he is unable to pay his debts. Under the old Act of 1907 also, as it is under the present Act, a debtor's petition was to contain a statement that he is unable to pay his debts. But under that Act inability to pay the debts was not a condition precedent to the presentation of petition as it is under the Act of 1920. Prior to the Privy Council ruling there was a difference of opinion under the old Act as to whether a debtor's petition could be dismissed if he did not satisfy the court that he was unable to pay his debts. *Jenkin C. J. held in Kali Kumar Das v. Gopi Krishan Ray* (2) that the court could not do that. On the other hand, it was held in the *Lakshmi Bank Ltd., v. Ram Chandar Narayan Apte* (3) that under section 11 (1) of Act 3 of 1907 the debtor has to state in his petition that he was unable to pay his debts, and, if either on the face of the proceedings or on representation by the opposing creditor the court was satisfied that this statement was not correct, the court could dismiss the petition. The view of the Bombay High Court is against the Privy Council ruling. Under the present Act there can be no doubt that inability to pay debts is a condition precedent before a debtor can be adjudged insolvent. The object of the change was to prevent the abuse of the debtors filing their petitions as a method of evading liability of arrest in execution of decrees against them (4). When these words were added in section 10 it was objected that it will involve preliminary enquiry into matters properly arising at a later stage, particularly if it is alleged that there has been any fraudulent concealment of assets. To meet this objection a proviso requiring a *prima facie* proof of the debtor's inability to pay his debts at the stage with which section 14 deals was added. The net result of these two additions in the Act has been, however, to leave the matters where they were. The object of the addition of these words in section 10 was to prevent the rush of debtors to the insolvency court, but, having regard to the limitations imposed upon the court in regard to its power of enquiry at this stage, adjudication has become the rule rather than the exception. When the time for applying for discharge comes, it is very often found that creditors do not appear and oppose the application with the result that the debtor gets his discharge as a matter of course. Once the debtor has been adjudged insolvent, the creditors usually cease to have any interest in the proceeding because in actual practice the gain to them by pursuing the matter is very little, if any, at all.

Inability to pay his debts is a question of fact.—On a debtor's petition the court should record a finding as to whether the debtor is unable to pay his debts. It is to be arrived at like any other finding by a judicial tribunal in which the reason of so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a judge to resort to a mere negative

(1) *Durai Swami Chatterier v. Abdul Suban Sahib*, A. I. R. 1932 Mad. 237; L. R. 1932 Mad. 372; 137 I. C. 390; 35 L. W. 148; 62 Mad. L. J. 234; *Net Ram v. Bhagirthi*, A. I. R. 1918 All. 368; 40 All. 75; 15 All. L. J. 885; 43 I. C.; *Mohir-ud-Din Sarkar v. The Secretary Hadal Gramya Rindan Samiti*, 57 I. C. 977.

(2) (1911) 15 C. W. N. 1990; 12 I. C. 48; *Bidhat Din v. Jagan Nath*, (1912) 9 All. L. J. 699; 14 I. C. 570.

(3) 46 Bom. 757; 14 B. L. R. 292.

(4) *Mathura Ram v. Baldeo Ram*, A. I. R. 1924 All. 800, 801; 80 I. C. 21; *Siya*

and say : "I do not know, you may be able or you may not but I am not satisfied." (1).

Onus —The onus of proving all the essential conditions required under section 13 lies on the debtor ; otherwise he has no *locus standi* to apply and his application must be dismissed (2).

Unable to pay debts ; its meaning.—The meaning of the expression "unable to pay debts" is that the realisable assets of the debtor should be less than his liabilities. The court should consider the matter from the point of liquid assets. A man may have property tied up either in property or securities, which, owing to the state of the market, he cannot realise and thus may be insolvent although the face value of the property may be more than his actual liabilities (3). But the question for consideration is not whether the debts can be satisfied immediately out of the assets, but whether the assets are so locked up that the debtor will be unable to pay at the time he is called upon to pay (4). It is the market value of the assets which is to be considered and not the value on paper. The fact that his father is a rich man or that his father allows him to cultivate certain land is not sufficient to show that he can pay the debts due by him (5).

Where, however, on the debtor's own showing his assets exceed his liabilities, it is for him to show also that by the sale of his interest, and after realisation of his assets a sum would not be secured which should enable him to pay his debts in full (6). Thus where the debtor valued his property at Rs. 48000- and stated that the debts due by him were Rs. 13000- odd only and it was not alleged that the assets are locked up in investments for which there is no market or that they are otherwise incapable of realisation the application was dismissed. The case, *Dad Khan v. Chanti Ram* (7) was that of an agriculturist debtor whose land could not be sold otherwise than in accordance with the Punjab Land Alienation Act. The value of the property was shown as five times the value of the debts by the debtor himself. It was held that the debtor was not unable to pay his debts. The learned judge remarked : "He could either sell a fraction of his land to an agriculturist or he could charge a larger fraction in order to raise the necessary funds. Counsel contends that it is the duty of insolvency court to pass an order of adjudication and then to make arrangements for farming a portion of the land. If the insolvency court can arrange to farm a portion of the land, the applicant can equally well arrange a lease of the same portion. The words in the section must, I think, be read as meaning what they say and if a man has on his own showing marketable property of an infinitely greater value than his outstanding debts, he is clearly able to pay them. The fact that the debtor's power of alienation is restricted in certain respects by statute is a wholly immaterial circumstance in considering the debtor's inability to pay his debts (8). The reason is that the

(1) *Mathura Ram v. Baldeo Ram*, A. I. R. 1924 All. 800 (2).

(2) *Gobind Prasad Gir v. Kishun Lal Dhokri*, A. I. R. 1924 Patna 166 ; *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, A. I. R. 1923 Lah. 202 : 28 P. L. R. 468 : 9 L. L. J. 550 : 1905 I. C. 569 ; *Siya Ram v. Kishori Lal*, A. I. R. 1933 All. 841.

(3) *Mathura Ram v. Baldeo Ram*, A. I. R. 1924 All. 800 (2).

(4) *Mohan Lal v. Ratna*, 1935 A. M. L. J. 51.

(5) *Thakar Singh v. Hardit Singh*, A. I. R. 1928 Lah. 237 : 106 I. C. 574.

(6) *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, A. I. R. 1928 Lahore 202 : 105 I. C. 569 : 9 L. L. J. 550 : 28 P. L. R. 463.

(7) A. I. R. 1925 Lahore 630.

(8) *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, A. I. R. 1923 Lahore 202 ; *Kashmira Singh v. Baldev Din*, A.Z.R. 1929 Lahore 573 : 120 I. C. 173.

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(1).

restriction against alienation is not absolute, only that under the Punjab Alienation Act the land of an agriculturist cannot be sold to a non-agriculturist. It is open to a non-agriculturist to recover his money due to him from an agriculturist by any legal means in his power and if such a person can induce an agriculturist to pay off a debt due to him and to take mortgage of land from his debtor as security for himself, there is nothing in the Punjab alienation of land Act to prohibit such a course. It is immaterial whether the mortgagee pays him cash or gives his bond, nor has he anything to do with the correctness of the account or the amount due beyond what the debtor himself admits and asks the mortgagee to pay for him (1). Unless it is shown that the landlord had refused to allow alienation of the occupancy rights, it cannot be said that the debtor possessing those occupancy rights is unable to pay his debts (2). Nor can the same be said where the landlord is willing to purchase the land (3). The fact that the only property to which the petitioning debtor is entitled is his share in the joint family property of which he cannot, under the Hindu Law, enforce partition during the lifetime of his father, is no ground for holding that the debtor has no property available for payment of his creditors. His interest in property is alienable, notwithstanding the restriction, and its value must be taken into consideration in determining whether he is unable to pay his debts (4). In a case the assets of the insolvent (consisting of inalienable land and house) if realised by him were worth more than the debts, and the difference between the debts and the assets on the most favourable showing was not very large, it was held that the debts due were cash debts and the assets were not immediately realisable (5). Under the section the court is not required to enter into a nice calculation of the assets of the debtor and balance them against his liabilities (6). The petition should not be dismissed merely because upon a nice calculation of the value of the assets it might be possible to hold that the value of the assets exceeds the amount of liabilities (7). Adjudication is now the rule rather than the exception and meticulous examination of the assets and liabilities and carefully balanced adjustment of these is neither necessary nor required (8). Where a large portion of the debts incurred by an insolvent was spent in litigation undertaken by his wife to recover a share of the estate left by a father or husband and where the creditors lent their money, with their eyes open expecting indemnification at the end of litigation, it was held under the circumstances that it could not be said that the petitioner has no reasonable prospect of being able to repay the loans (9).

(1) *Haidar v. Fattah Khan*, A. I. R. 1917 Lahore 71.

(2) *Barkat Ali v. Guran Dita*, 99 I. C. 997 : 27 P. L. R. 422 : A. I. R. 1926 J. 143 (2) ; *Jai Singh v. Farid Baksh*, A. I. R. 1929 Lahore 392 : 30 P. L. R. 15 : 115 I. C. 423 ; *Allahaditta v. Dewa Singh*, 37 P. L. R. 82 : 153 I. C. 460 : A. L. R. 1935 Lahore 183.

(3) *Wadhwa Singh v. Amir Singh*, 154 I. C. 605 : A. I. R. 1934 Lahore 985 (1).

(4) *Bhagirth Lal v. Kanwal Narain*, (1929) 11 Lah. L. J. 490.

(5) *Karim Baksh v. Gaja Dhari and others*, A. I. R. 1934 Lahore 63, (1)

(6) *Imam Din v. Rupa Jhangi Atmaram*, 132 I. C. 11 : 31 P. L. R. 1016 : A. I. R. 1930 Notes 21b.

(7) *Mul Singh v. Ram Singh*, (1925, 6 L. L. J. 306 : 89 I. C. 32) : A. I. R. 1924 Lah. 724 ; *Amir Chand Mahesh Das v. Bhag Singh*, (1928) 10 L. L. J. 493 : 114 I. C. 54 : A. I. R. 1929 Lah. 49.

(8) *Imam Din v. Rupa Jhangi Atmaram*, 132 I. C. 11 : 31 P. L. R. 1016 : A. I. R. 1930 Notes 21 (b).

(9) *Subbiah Pillai v. Abdul Rashid*, 9 I. C. 462 : 4 Bur. L. T. 18.

Nature and extent of proof to show inability to pay debts ; S. 10
S. 24 (1), Proviso.—Section 10 provides that a debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debts. (1) (a)
 The object of imposing this condition was to stiffen the law against (b)
 the debtor as it existed under the Act 3 of 1907. At the same time the legislature had to bear in mind the well established principle that the proper stage for investigation of the debtor's conduct in dealing with his property is when he applies for discharge. In order to effect a compromise between these two principles inability to pay debts was made a condition precedent in section 10 but, at the same time, the court's powers were limited to require a *prima facie* proof thereof only so as to exclude any detailed enquiry into the debtor's conduct, by the addition of the proviso to section 24 of the present Act. It, but for the proviso, is almost the same as section 14 of Act 3 of 1907. For cases and full notes on the point refer to the commentary under Section 24 (1) Proviso.

Clause (a). Debt must amount to Rs. 500.—Money due under a rent decree is a debt within section 10 (1) (a) of Act 5 of 1920 (1). Debt includes money payable under a decree. In order to make a person liable to be declared an insolvent, it is sufficient if he is personally liable for the debts though the decrees obtained by the creditor do not make him so liable (2). A person is entitled to present an application for insolvency if he can show that the debts payable by him, whether alone or jointly with others, amount to more than Rs. 500 (3). The same principle applies if the debtor is jointly and severally liable under a decree for Rs. 500 (4). The fact that a suit is commenced to enforce a bond is not a bar to a petition for adjudication based on that debt, provided the debt is proved in the insolvency court (5).

Arrest or Imprisonment.—In some old cases (6) there was some difference of opinion (under the Code of Civil Procedure 1882) as to the court's power of releasing the debtor, turning upon the meaning of the words "Arrest and Imprisonment." To avoid that difficulty both the words have been used in the section. To satisfy this condition it is necessary that the debtor on the date of his petition should be under arrest or imprisonment (7). Subsequent arrest of the petitioner does not give him a right to continue an application which did not lie when it was presented, the petitioner not being under arrest at that date. The application by the debtor does not lie after his release from arrest or imprisonment. According to section 6 clause (h) a debtor commits an act of insolvency if he is imprisoned in an execution of a decree of any court for the payment of the money. The arrest or imprisonment mentioned in section 10 (1) (b) is an event which the debtor may prove as a condition on which he may petition. The wording is such that if the debtor is the petitioner and he relies upon section 10 (1) (b) as one

(1) *Munna Singh v. Digbijai Singh*, 60 I. C. 758 : 19 A. J. J. 273 : A. I. R. 1921 All. 74.

(2) *Gulam Husain v. Rameshar Das*, 99 I. C. 524 : A. I. R. 1927 Lahore 108.

(3) *Somasundaram Chettiar v. Kannoo Chettiar*, 118 I. C. 494 : 1929 M. W. N. 262 : A. I. R. 1929 Mad. 573.

(4) *Somasundaram Chettiar v. Kannoo Chettiar*, 118 I. C. 494 : 1929 M. W. N. 262 : A. I. R. 1929 Madras 573.

(5) *Ananta Kumar v. Sadhu Charan*, A. I. R. 1923 Cal. 234 : 87 I. C. 751.

(6) In the matter of *William Hastie*, 11 Cal. 451 ; *Mahomed Hussain v. Radhi*, 12 Bom. 46 ; *In re Quarme*, 8 Mad. 503.

(7) *Jumai v. Muhamma* ; *Kazim Ali* (1902) 25 All. 904

S. 10 (2). of the conditions it is required that he should be actually under arrest or imprisonment on the date of the petition. Where the creditor relies upon the commission of an act of insolvency mentioned in section 6 (h) it is not necessary that the debtor should be imprisoned at the date the creditor presents the petition. Thus there is a difference between the requirements of a creditor's and debtor's petition when it arises out of the arrest of imprisonment of the debtor. It is sufficient if the debtor is under arrest ; it is not necessary that he should be imprisoned.

Section 1 (c). It requires that there should be an order of attachment and that it should be subsisting against the property of the debtor on the date of the petition (1). It is also obvious that the property attached should be the debtor's property (2). An attachment before judgment is not attachment in execution of a decree, but if the suit in which the attachment before judgment takes place eventually results in a decree, no fresh attachment being necessary, the attachment before judgment will be considered, after the passing of the decree, an attachment in execution of a decree (3).

Section 10, subsection 2. Petition by debtor whose adjudication has been annulled for failure to apply for discharge.

Section 27, clause 1 provides that an order of adjudication shall specify the period within which the debtor must apply for discharge. Sub-section (2) authorises the court to extend this period. If the debtor does not apply for discharge within the period specified by the court, the order of adjudication must be annulled under section 43, Provincial Insolvency Act. Under the Provincial Insolvency Act once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained the order of discharge or until his previous adjudication has been annulled (4). In case where a previous adjudication has been annulled for failure to apply for discharge the second application is not maintainable without the leave of the court by which the order of adjudication was annulled. To give this information to the court to whom the second petition is presented it is provided by clause (f) of section 13 that the petition shall contain a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent and if so the result of that petition.

Leave of the court—The leave of the court shall not be granted unless the debtor was prevented by any reasonable cause from presenting or prosecuting his application for discharge or unless the petition is founded on facts substantially different from those contained in the first petition. Where the court directed an insolvent, who applied for discharge, to renew his application for discharge "6 months hence" but as no application was made within that period the adjudication was annulled under section 43, it was held in the circumstances of the case that the order of the court being obscure and misleading the debtor had reasonable cause for not prosecuting his application for discharge, and leave to present a second petition was granted (5). Where a person was adjudicated an insolvent and was ordered to apply for an order of his discharge within six months

(1) *Jumai v. Muhamad Kazimali*, (1903) 25 All. 204 at 203.

(2) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.*, (1912) 16 C. W. N. 733 : 14 I. C. 576.

(3) *Makhan Lal v. Gulzar Mal*, 6 All. 289.

(4) *Ram Das v. Sultan Hussain Khan*, 115 I. C. 107 : 6 Oudh W. N. 100 : A. I. R. 1929 Oudh 149.

(5) *J. M. Gae v. Shib Narain*, 118 I. C. 332 : A. I. R. 1929 Pat 104

and his assets were taken charge of by the Official Receiver, which were sold and the amount was deposited with him but none of the creditors appeared to receive the same, and so he suggested that as the insolvent also had not applied for his discharge as directed by the court the adjudication should be annulled, whereupon the District Judge without giving any notice to the insolvent or to the other parties concerned annulled the adjudication; it was held that leave to present a fresh petition of insolvency should be granted as the estate of the insolvent was still under administration by the Official Receiver and consequently the insolvent might have been under a reasonable impression that he need not apply till the assets held by the Official Receiver had been distributed to the creditors (1). Permission by court to file a second application must be expressly granted. It cannot be inferred from any casual reference (2).

Maintainability of petitions not falling under section 10 (2).—Section 10, clause (2) implies that, apart from annulment, a second petition lies (3), unless it is barred by the general rule of *res judicata* (4). Where an application for adjudication is dismissed for default, a fresh application can be made upon the same facts (5). The fact that the insolvent's first petition was dismissed for failure to produce his evidence does not bar a second petition on the general principles of *res judicata* as there is in the case of the former petition no trial on the merits (6). The fact that the insolvent, when he filed his previous application, was not able to prove that he was unable to pay his debts cannot estop him from proving in the subsequent application that he is unable to pay his debts at the time of the second application and so he is entitled to be adjudicated an insolvent (7).

Adjudication on fresh petition without leave.—Under section 35, as amended by section 5 of Act 11 of 1927, the court may, of its own motion or on an application made by the Receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section 2 of section 10, not entitled to present such petition. Before the Act 11 of 1927 no decided case on the point under the Provincial Insolvency Act has been reported. Under the Presidency-towns Insolvency Act it was however held in the under mentioned cases (8) that the court had inherent jurisdiction to annul an adjudication made on a petition which did not lie for any reason (including circumstances dealt with under section 10 (2) of the Provincial Insolvency Act). For detailed information refer to the heading "History" under the present section.

One single petition by more than one debtor.—See commentary under section 7 under the same heading.

(1) *Beli Ram v. Mangal Das*, 117 I. C. 237 : A.I.R. 1928 Lah. 452.

(2) *Gopi Chand Duni Chand v. Hukamat Khan*, A. I. R. 1937 Pesh. 85 (1).

(3) *Y. V. Rangappa v. M. Konappa*, 101 I. C. 349 : 1927 M. W. N. 176 : 59 M. L. T. 118 : A. I. R. 1927 Mad. 579.

(4) 75 P. R. 1905.

(5) *Durga Kanta Sarma v. Anto Koch*, (1917) 22 C. W. N. 671 : 42 I. C. 649 ; *Abdul Aziz v. Habib Mistri*, (1919) 49 I. C. 229 (Cal.) ; *Ram Prasad Bhagat v. Mahadev Lal*, A. I. R. 1921 Pat. 472 (1) : 2 P. L. T. 335.

(6) *Salig Ram v. Ram Kishan Das*, (1912) 10 All. L. J. 51 : 15 I. C. 51 ; *Hasan Din v. Kirpa Ram*, A. I. R. 1928 Lahore 374.

(7) *Ram Asrav Sahu v. Sri Ram Dubey*, A. I. R. 1934 Oudh 94 (1).

(8) *Mahadev Lal v. Ram Prasad Bhagat*, A. I. R. 1921 Pat. 472 (1).

S. 11. **11.** Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody :

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

History.—This is section 6 (2) of the Act 3 of 1907, with the proviso added. Under the old Act it was held that section 47 (1), reproduced in section 5 of the present Act, did not directly or by implication render section 21, Civil Procedure Code, 1908, applicable to proceedings under the Provincial Insolvency Act (1). The proviso was added in the new Act to over-rule that view (2).

Analogous Law.—Section 11, Presidency towns Insolvency Act defines the jurisdiction of the courts which are to administer the law under that Act. It is somewhat similarly worded but the change in language is material in many respects. Section 20, clause (b), Civil Procedure Code also gives jurisdiction in suits to a court within whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Clause (12) of the Letters Patent of Calcutta, Bombay and Madras High Courts provide that the ordinary original civil jurisdiction of these High Courts shall extend to persons who at the time of the commencement of the suit dwell or carry on business, or personally work for gain within the limits of their jurisdiction.

Applicability of decisions under Presidency-towns Insolvency Act, Civil Procedure Code and Letters Patent.—The language used in these various enactments is somewhat different. It is also true that the Legislature often employs the word "residence" in different senses, and that whether it is used in a particular section in a narrow or more extended meaning is to be determined according to what the court believes to have been the intention of the legislature in making the provision in which the word occurs. The word need not necessarily have the same meaning in different enactments, nor even in different sections of the same enactment. The same word has been used in different statutes. Rulings under the one should therefore be utilised for interpreting the same word used in another with caution. At the same time it is true that there is a remarkable similarity in the language used in different statutes. As a matter of fact cases under such, though different, statutes have been utilised in the interpretation of expressions appearing in them. For instance it has been held that the word "dwell" in clause 12 of the Letters Patent, and the word "reside" in section 20, Civil Procedure Code mean the same thing and the decisions which have been arrived at in affixing a meaning

(1) *Madho Prasad v. A. L. Walton*, 20 I. C. 370.

(2) Notes on clauses.

to the one word could be a safe guide in determining the meaning to be §. 11, attached to the other (1).

Construction of the section.—It has been held in England that the court will put a liberal construction on a similar section occurring in the English statutes (2). It appears that the same rule of construction will apply to the Indian statute. The decision in *Ex parte Breull* referred to above turned on the meaning of the expression "carrying on business" to which was given a broad and extended meaning to effect the object of the Bankruptcy Act, which was to distribute the bankruptcy business, so that a debtor should be sued in the most convenient form, and not taken away to another of which neither he nor his creditor knew anything. To effect this object the court held that the words used were elastic, and construed them accordingly. The meaning of the word "residence" was not there decided, though Lord Justice James was prepared with the above object to give it a very wide interpretation.

Court having jurisdiction under this Act.—The court having jurisdiction under the Act is the District Court or any Court specially empowered by the Local Government in that behalf (3).

Ordinarily resides.—In the Encyclopædia Dictionary (Cassel) "reside" is defined "to dwell permanently or for a length of time, to have one's home or settled abode; to abide continuously or for a lengthened period." "Dwell" is defined "to reside, to abide in a place; to have a habitation; to be a resident or inhabitant." Webster contains a similar definition of these words. Except that "dwell" is of Saxon origin, and "reside" is imported in the English language from the Latin, there is no distinction between residing and dwelling in its ordinary signification (4). The decisions which have been arrived at in affixing a meaning to the one word would be a safe guide in determining the meaning to be attached to the other (5). Neither expression necessarily implies a permanent state of things (6); but when we wish to speak of residence for a limited time, we apply a limiting adjective. When, in ordinary language, you speak of a man's residence without any qualifying adjective, his permanent residence is understood.

It is not prescribed as for what length of time a man should stay in a place as to constitute residence in that place. Still the dwelling or residence must be more or less of a permanent character. Therefore when the defendant has a permanent dwelling at one place he cannot be said to dwell at a place where he is lodged for a temporary purpose only, e.g., to defend a suit against him (7) or for a change while on leave (8). If, however, a person has no permanent place of residence, he will be deemed to dwell where he is actually staying at the time. In I. L. R. 25 Bombay 176 (9) the defendant who was a political agent at Kolahpur, left Kolahpur *en route* for England and stayed in Bombay for three days before sailing; he

(1) *Goswami Shri v. Shri Govardhan Lal Jee*, 14 Bom. 541.

(2) *James L. J. in ex parte Breull; in re Bowi*, L. R. 16 Ch. D. 487

(3) S. 3.

(4) *Mahomed Shuffi v. Laldin Abdula*, I. L. R. 3 Bom 227; *Everet v. Frere* I L. R. 8 Mad 205.

(5) I L R 14 Bom 547

(6) In the matter of *F. De. Momet*, 21 Cal 634 (S. 5 of the Indian Insolvent Act)

(7) *Amritlall v. Kidd*, (1864) 2 Hyde 119.

(8) *Kavasji v. Wallace*, (1863) 1 Bom. H. C. 113; *Kissun Sing v. Sturt* 1807) 5 Mad. H. C. 471.

(9) *Franandez v. Wray*.

S. 11, was held to dwell in Bombay because at the time he had no permanent residence. It is remarked that for the purposes of jurisdiction a man may be said *prima facie* to dwell where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place. It was contended that the defendant's permanent residence was at Kolahpur. As to this the court remarked: "The only residence that has been suggested is Kolahpur. But he gave over charge of his appointment there and left the place on the 6th March. The house in which he had lived there was not his own. It was a house belonging to Government and it is occupied by the Political Agent for the time being, and the Officer appointed to act for Colonel Wray took up his residence there. Colonel Wray had sold off his furniture and other effects at Kolahpur, so that it would appear that he did not intend to return. At all events there is nothing to show that he did intend to return. I think, therefore, that he ceased to dwell at Kolhapur on the 6th March and that when this plaint was presented he had not acquired any other residence, and must, therefore, be taken to have been then dwelling in Bombay, and that this Court has jurisdiction under clause 12 of the Latters Patent." Similarly in a Calcutta case, a racing man, who had to come to Calcutta for a month for racing was held to dwell in Calcutta for he had no other residence at the time when the suit was instituted against him (1). The term "residence" may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family there can be no doubt as to the place where he resides; the places of his personal and legal residence are the same. When, on the other hand, a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides; he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet they pass great portions of their time in other places. Such persons have a legal residence with their families and a personal residence in the other places, and the word "reside" may, with respect to such persons, be used in relation to either their personal or their legal residence. From this point of view, it is manifest that one may have two places of residence, the one in which he resides during one portion of the year thus becomes the place of legal residence during the remainder of the year and *vice versa* (2). In *Kumad Nath Rai Choudhari v. Jolindra Nath Choudhari* (3), a case under Order 5, rules 9 and 17, Civil Procedure Code, 1908, the term "residence" was defined as meaning the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep. This definition was not accepted as exhaustive in *A. I. R. 1923 Mad. 585* (4). It was held there that the debtor in that case may not have any permanent or continuous residence yet where he says that he remained within a particular district, he does not cease to reside there simply because he might have occasionally gone outside the district. In *Madho Prasad v. A. M.*

(1) *Morris v. Baumgarten*, (1865) *Coryton*, 152; *Mayhew v. Tullock*, (1872) 4 N. W. P. H. C. R. 25.

(2) (*Srimati*) *Anilabala Choudhurani v. Dharendra Nath* and another, *A. I. R. 1921 Cal. 809*; 43 Cal. 577; 65 I. C. 57, (case decided under Lunacy Act Ss. 37 and 62).

(3) *I. L. R. 36 Cal. 394*; 1 I. C. 49.

(4) *Lakshminarayana Aiyar v. Subramania Iyer*, *A. I. R. 1923 Mad. 585*; 73 I. C. 74.

Walton (1) the petitioner was employed as a guard in the Bengal Nagpur S. 11. Railway. He resided at D in the Central Provinces and ran trains occasionally from D to K, but he had no permanent residence at K where he stopped with a relative. He made his application for insolvency in the district court at M having jurisdiction in K as a decree for money was obtained against him at M. It was held that the mere fact that when at K he stopped with his relative did not show that he ordinarily resided or personally worked for gain at K within the meaning of section 6 sub-section 2, Provincial Insolvency Act (3 of 1907), and that therefore the district court at M had no jurisdiction to entertain the petition for insolvency. In an Oudh case, where the debtor at the time of filing the petition was residing in Lucknow with his relatives and previous to his application had been residing in the Central Provinces, it was held that the Lucknow Court had jurisdiction to entertain the petition (2).

A person may have more than one residence.—A person may have more than one place of residence at the same time. If so, he will be deemed to dwell in any one of the places where he is actually present for the time being and he may be sued at that place (3). In this last case the defendant who had a dwelling at Mussoori was held under the circumstances of the case to have another place of residence also. Similarly where a defendant spent his time alternately in Calcutta and a mufassil town, he was sued at Calcutta where he had resided at the time of the institution of the suit (4), but a person who has been living and carrying on business in Bombay for twenty years cannot be said to be residing at Ahmedabad because he has a family house at Ahmedabad which he visits occasionally; in such a case Ahmedabad cannot be said to be one of his places of residence (5). Where an Acharya (Hindu head-priest), who had his permanent place of residence at Nathdwar where he had been installed on the *gadi* in 1879, came to Bombay for the first time in April, 1889 at the invitation of his devotees and stayed in a house which he had purchased in 188 for occasional residence and exchanged visits with his followers, it was held in a suit brought against him in Madras some months after his residence there that inasmuch as he had taken up his abode in Madras, meaning to remain there for several months, and was actually living there when the suit was instituted, he "dwelled" in Madras within the meaning of clause 12 of the Letters Patent (6). Under section 6 sub-section 2 of the Act, it is not necessary for the petitioner to reside for a long time at a place within the jurisdiction of the court. The procedure laid down in the Provincial Insolvency Act is materially different from that laid down in the Code of Civil Procedure, 1882 (7). In a case some months before the institution of the suit the defendant, who was domiciled in the Mysore State, left his house in Mysore in charge of a peon, and had brought his wife and child in Madras and taken a house there, and apprenticed himself for one year to a Vakild of the High Court with a view to become enrolled as a Vakild. He was present in Madras

(1) 18 C. W. N. 1050.

(2) *Henry Thomas Victor v. Muhammed Gul Khan*, 1917 O. C. 176 : 39 I. C. 458.

(3) *Sophia Orde v. Alexander Skinner*, 3 All. 91 P. C.

(4) *Nishandiney v. Kalli*, (1864) *Coryton*, 24.

(5) *Ugar Chand v. Suraimal*, (1900) 2 Bom. L. R. 605 ; *Guranditta Mal v. Ram Das*, (1916) P. R. No. 112, P. 343 : 38 I. C. 62.

(6) *Srinivasa v. Venkata*, (1911) 34 Mad. 257 : 38 I. A. 129 : 11 I. C. 447, *on app.* from 29 Mad. 239.

(7) *Abdul Razak v. Basiruddin Ahmed*, 15 C. L. J. 457 : 14 Ind. Cas. 980 : 17 C. W. N. 405

S. 11. on 30th August, 1901 when the plaint was filed, but left on the following day before the summons was served. It was held that the High Court had jurisdiction under clause 12 of the Letters Patent to try the suit (1).

Where a person has been confined in the Central Jail, Rangoon for 18 months prior to the institution of the petition for his insolvency, he has been ordinarily resident in Rangoon for upwards of 12 months for purposes of section 11 and the Rangoon Court has jurisdiction (2).

There is nothing to show that the residence contemplated by section 5 of the Insolvent Act must necessarily be a permanent residence; the object of that section being to extend the benefit of the Act to those who could be said to be *bona fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions. (3)

Miscellaneous.—An insolvency debtor is not in the same position as a plaintiff as to the right of the choice of court in which his insolvency should be conducted (4). A debtor's motive in taking up his residence in a particular place does not effect the question whether he is to be deemed to have "ordinarily resided" there (5).

Carries on business.—These words also occur in clause 12 of the Letters Patent (6). The word 'business' is used in a restricted sense (7). It is indicated by the words 'personally works for gain' to be found in the same section. The latter words would be unnecessary if the word business had been intended to be used in an unrestricted sense. Accordingly it has been held that the work carried on by the Government of India in governing the country, in salt, opium, etc., although carried on by Government Officers in charge of several departments, is not properly speaking business carried on by Government but work carried on for the benefit of the Indian exchequer. The word is limited to commercial business. It was so held in 14 Bom. 54 (8). It was held that a priest who receives presents or offerings and reckons and keeps an account of them is not, in ordinary language, considered to carry on business, even though he may be a man held in reverence by his devotees as of superhuman holiness or as containing in himself an incarnation of the deity, and the facts of the offerings being on so large a scale and coming from such an extended area that the defendant is obliged to employ servants to collect and keep an account of them, does not alter the character of the defendant's source of livelihood, which remains, notwithstanding its magnitude, eleemosinary. A person may carry on business

(1) *Siriniyasa Moorthy v. Venkata Varada Ayyangar*, confirmed on appeal to P. C. in I. L. R. 34 Mad. 257.

(2) *M. V. R. Veluswamy Thevar In re*, 13 Rang. 192 : 159 I. C. 217 : A. I. R. 1935 Rang. 243.

(3) *In the matter of F. De Momet*, 21 Cal. 634

(4) *Krishna Kishore Paul, In re*, A. I. R. 1931 Cal 775.

(5) *Visvanath Chetty v. Official Assignee*, 31 M. L. W. 229 : 1930 M. W. N. 97 : A. I. R. 1930 Mad. 544 : 58 M. L. J. 189.

(6) *L. E. Salicioni, In re*, 164 I. C. 627 : 39 C. W. N. 324.

(7) *Daya Narain v. Secretary of State* (1887) 14 Cal. 256 273 ; *Govindrajulu v. Secretary of State*, (1927) 50 Mad. 449 : 105 I. C. 576 : A. I. R. 1927 Mad. 689

Rdricks v. Secretary of State for India, 40 Cal. 308.

(8) *Goswami Shiri v. Shri Goverdhan Lal ji*.

at a place where he has no office or regular establishment. Thus a person residing in the mufassal who goes once or twice a week from the mufassal to a friend's house at Calcutta and does business there will be said to carry on business in Calcutta (1). The expression means entering into transactions which may result in personal liabilities (2).

Business that he carried on either in person or through an agent.

—The business need not be carried on personally. In section 11, Presidency-town Insolvency Act it is expressly provided that business may be carried on either in person or through an agent. The words 'either in person or through an agent' do not occur in clause 12 of the Letters Patent or in section 11, Provincial Insolvency Act. The omission of these words, however, does not make any difference (3). Under clause 12 as well as under section 11, Provincial Insolvency Act it has been held that it is not necessary that business should be carried on personally but that it may be carried on through an agent (4). Under clause 12 this view was taken as early as 1880. It was so held in 4 Mad. 209 (5). Turner, C. J. remarked as follows :—

"Although persons working for gain within those limits are not liable to the jurisdiction of the court unless they personally work within the limits, there is nothing in the provisions of the Letters Patent which confines the jurisdiction of the court to persons who personally carry on business within the limits and the omission of the term "personally" before the word "carry on business" and its introduction before the words "work for gain" offer a strong argument that it was not intended the former words should be so limited. The phrase "carries on business" is used as distinct from the phrase "personally work for gain." A man may carry on business in a place where he does no personal work of any kind and he may be carrying on business at a particular place either through an agent or through a manager or by its servants without ever having left his own town."

Carrying on business means having an interest in the business transactions at a particular place ; a voice in what is done ; a share in the gain or loss, as the case may be ; and some control, if not over the actual method of working, at any rate, upon the existence of the business (6).

On the authorities Mr. Mulla has laid down that the following three conditions should concur in order to find that a person is carrying on business through an agent :—

"1. The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him (7). Thus a trader in the mufassal, who habitually sends grain to Madras for

(1) *Greeschunder v. Collins*, (1894) 2 Hyde 79.

(2) *L. E. S. Salcicioni, In re*, 164 I. C. 627 : 39 C. W. N. 324.

(3) In S. 108, P.T. I.A., 1909, also, the expression used is "carries on business" and the words "either in person or through an agent" do not occur. The former expression has been interpreted by the Sind High Court as meaning business carried on personally only and not including business carried on through an agent; *vide In the matter of Tekchand Gurnomal*, A. I. R. 1936 Sind 175.

(4) *Chetandas Mohandas v. Messrs. Ralli Brothers*, 83 I. C. 135 : A. I. R. 1925 Sind 153.

(5) *M. R. R. M. Muthaya Chatti and John Harrison Allan*.

(6) *Kirpa Ram v. Mangal Sein*, A. I. R. 1922 All. 367.

(7) *Reloonal Totaram, In re*, 112 I. C. 134 : A. I. R. 1929 Sind 24; *Firm Netsidas Bansidhar, In re*, 27 S. L. R. 298 : 144 I. C. 885 : A. I. R. 1933 Sind 202.

S. 11. sale by a firm of commission agents, who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras (1). So a firm in England, carrying on business in the name A. B. and Co, which employs upon the usual terms a Bombay firm carrying on business in the name of C. D and Co., to act as the English firm's commission agents in Bombay, does not "carry on business" in Bombay as so to render itself liable to be sued in Bombay (2).

2. The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an "agent" within the meaning of this condition (3).

3. To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the mufassal cannot be said to "carry on business" in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent makes sales there on his behalf (4). A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta cannot be said to do business in Amritsar (5). Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a post office forwarding proposals and sending moneys cannot be said to do business in Madras (6).

So long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on. The appointment of a Receiver cannot prevent the order of adjudication being made. The legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the Court to appoint a Receiver (7).

Jurisdiction of British Indian Courts over non-resident foreigners.—We have to consider the case of a person who is not a British Indian subject nor resides in British India but carries on business in India through an agent. It is settled law both under the English and Indian systems, that if a foreigner resides or himself carries on business or personally works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts. In a case arising under section 18 of the Presidency Small Cause Courts Act it was held in *Girdhar Damodar v. Kassigar Hira Gar* (8), that where a foreigner did not reside in Bombay but carried on business there by his Munim the Small Cause Court in Bombay had jurisdiction to try his suit brought against him in that court. The cause of action had arisen in Bombay but the leave of the court as required by section 18 (a) was not obtained. The question of jurisdiction fell to be decided by reference to

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- (1) Chinnammal v. Tulukannotammal, (1866) 6 M. H. C. 146.
 - (2) Khimji v. Forbes, (1871) 8 Bom. H. C. 102.
 - (3) Annamalai v. Murugasa, (1903) 26 Mad. 544; 30 I. A. 220.
 - (4) Framji v. Hormasji, (1865) 1 Bom. H. C. 220.
 - (5) Hiranand v. Gurmukh Rai, (1923) 73 I. C. 205; A. I. R. 1923 Lah. 427.
 - (6) John v. Sambamurthy, (1928) 56 Mad. L. T. 299, A. I. R. 1929 Mad. 347.
 - (7) Gokuldoss Gobardhan doss v. Dwarka Doss Govardan Doss, 91 I. C. 127; 22 M. L. W. 411; 1925 M. W. N 749; 48 Mad. 795; A. I. R. 1925 Mad. 1249; 49 M. L. J. 457.
 - (8) I. L. R. 17 Bom. 662.

other clauses of the same section; and the other clause relied upon was that he carried on business in Bombay through an agent. That was the sole ground upon which jurisdiction over the defendant was claimed. S. 11. Sargent, C. J. remarked:—"It is to be remarked, at the outset, that the general term "defendant" proceeds and governs the whole of the clause (b), and therefore, it was intended to have the same meaning when read with each of the three several cases mentioned in the clause as giving the courts jurisdiction; and as non-British subjects are clearly subject to the jurisdiction if they are "resident" "or personally work for gain," within the territorial limits of the Small Cause Court, it will be a strained construction of the clause to hold that they were excluded when the ground of jurisdiction is that they are carrying on business within those limits. The learned Judge who decided *Kessowji Damodar v. Kimji Jai Ram* (1) was not unconscious of this difficulty in excluding non-British subjects, but he held that he ought to disregard it, as to do otherwise, he said, would be a violation of the rule that every statute is to be construed and applied, so far as the language admits, so as not to be inconsistent with the comity of nations, or with the established rules of private international law." As to the contentions that all legislation is territorial and that a municipal Act should not be so interpreted as to make it inconsistent with the established rules of private international law, the learned judge said:—"The question is whether the legislature did not intend to depart from the general territorial rule. It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to the general municipal laws of British India. Still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the courts of the country. Moreover, in considering what was the true intention of the legislature, it is right to bear in mind the special circumstances of the Presidency towns in this country as regards the great number of non-British subjects who carry on trade within them, either personally or by *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the Presidency towns, the latter of which do not fall under clause (a)—a circumstance which might well affect the legislature in determining the jurisdiction of the Presidency courts, as regards defendants." In support of his reasoning the learned judge quoted the rule stated by Lord Esher, Master of the Rolls, in the important case of *Companhia de Mazambique v. British South African Company*, L. R. (1892) 2 Q. B. 358 at p. 394, namely:—"the question whether the courts of a nation will or will not entertain jurisdiction over any dispute is to be determined exclusively by the nation itself, *i.e.*, by its municipal law. If by express legislation the courts are directed to exercise jurisdiction, the courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may properly be drawn."

The same question arose in 54 Mad. 544 (2) but was left undecided both by the High Court and the Privy Council. The Privy Council however observe at page 551:—"In both the Courts in India it

(1) L. R. 12 Bom. 507.

(2) *Annamali Chetty v. Murugasa Chetty*, on appeal from 23 Mad. 458.

S. 11 was apparently assumed that the question of jurisdiction turned on section 17 of the Code of the Civil Procedure, and that although the defendant was a foreigner and although the cause of action arose in a foreign country and although the defendant did not personally reside within the local limits of the jurisdiction of any court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that court's jurisdiction. This assumption appears to Their Lordships to require more attention than it has received.

"Their Lordships see no reason for doubting the correctness of the decision of the case of 17 Bom. 652 where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought."

From the above quotation from the Privy Council judgment it appears that Their Lordships held the decision of the case of 17 Bom. 662 as correct on the ground that the cause of action arose within the local limits of the jurisdiction of the British Indian Courts in which the action was brought, but they expressly reserved their opinion as to its correctness so far as it was founded on the ground that the defendant carried on business through an agent. The same point arose in *A. I. R. 1929 Sind 24 (1)* and though it was not necessary to decide that point yet the learned Commissioner expressed his view that the amendment of section 11 (b), Presidency-towns Insolvency Act by the addition of the words, "either personally or through an agent" was intended to give a more extent to the jurisdiction of the insolvency court, and reference was made to the amendments of the English Bankruptcy Act by the Act of 1913 in adding the definition of the debtor in section 1 (2) and making another addition in section 4 clause (d) of the Bankruptcy Act of 1914.

The point is very difficult of solution. Under the English law it has been held that all legislation is primarily territorial unless the contrary is expressly enacted or plainly implied in the statute itself. I am of opinion that by enacting section 20, Civil Procedure Court or section 11, Provincial Insolvency Act the Legislature intended to bring within the jurisdiction of the British Indian courts foreigners in all those cases which properly fall within the meaning of these two enactments. The matter however does not rest there. I do not agree, with respect, with Sargent, J. that we have nothing to do with questions of international law and all that we have to do is to determine the scope and meaning of the enactment of the Indian Legislature. It is to be remembered that the Indian Legislature has limited powers to make laws. It is not like the British Parliament whose powers of legislation are unlimited. In interpreting an Act of Parliament the English courts have to take it for granted and the British Parliament has authority to legislate for all the persons and places of the world whether those laws be consistent or inconsistent with the established rules of private international law and the English courts must give effect to the intention of the British Parliament as expressed in a statute. The Indian Legislature is a creature of statute and its powers of legislation are defined by the Government of India Act. If an enactment of Indian Legislature is outside the scope of the powers conferred by the Governor General in Council or its successor, the present Indian Legislature, by Act of Parliament, the

Indian courts have power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect, with all the consequences that may result therefrom (1). That the Indian courts have power to decide as to whether the Indian Legislature has exceeded its powers in enacting any law was assumed in the Privy Council case of *Bugga v. King-Emperor* (2). The powers of the Indian Legislature are defined in section 65 and if in enacting section 20, C. P. C. or section 11, P. I. A the Legislature has exceeded its powers by intending to apply them to foreigners as well, to that extent it is competent to the courts to so declare. The answer to the question raised here therefore depends upon the determination of the competency of the Indian Legislature. It is submitted with respect that the Indian courts are not authorised to disregard an express provision of an Act of the Indian Legislature on the ground that it is inconsistent with the established rules of international law. If the intention of the legislature as expressed in a certain provision is inconsistent with the comity of nations the courts are bound to give effect to it without minding as to what the rule of international law is. It was on the different interpretation of the section as expressing such an intention that 12 Bom. 507 was overruled in 17 Bom. 667 and the argument of Sargent, C.J. that the general term defendant precedes and governs the whole of the clause seems to be unanswerable. So far as section 20, C.P.C. applies to person within British India it is clearly *intra vires*. It is however doubtful that section 20, C. P. C. is *intra vires* so far as it is intended to apply to foreigners. The view that the British Indian Courts have been held to have jurisdiction in cases where a foreigner resides within British India or personally carries on business or works for gain or has otherwise submitted to the jurisdiction of the British Indian Courts, can be supported on the ground that it is in accordance with the comity of nations and not only because section 20 gives it legal effect.

As to the reference to the course of english legislation made in A.I.R. 1929 Sind 24, I cannot do better than quote the criticism of Mr. Mulla:—

“It is a mistake to suppose that any jurisdiction over foreigners is conferred by the provisions of section 4 (1) (d) of the English Act. It is conferred by section 1 (2) of the Act, which contains for the first time a definition of “debtor”. A “debtor” under that section may be a British or even a non-British subject. Section 4 (1) (d) does not come into operation unless there is a debtor within the scope of section 1 (2). Before section 4 (1) (d) can be applied, it must be determined whether the person sought to be judged a bankrupt is a debtor within the meaning of section 1 (2), that is, a person capable of committing an act of bankruptcy. The capacity to commit an act of bankruptcy is to be measured by section 1 (2) and not by section 4 (1) (d) of that Act (3).

If the words “carries on business either in person or through an agent” in section 11 of the Presidency-towns Insolvency Act were intended to confer jurisdiction over a foreigner carrying on business within the jurisdiction through an agent, the Explanation to section 9 of the Act which says that for the purpose of that section the act of an agent may be the act of a principal would be superfluous. Moreover, the Explanation does not say that an act of insolvency committed by an agent is in every case the act

(1) *Farmeshwar Ahir v. Emperor*, A. I. R 1918 Pat. 155.

(2) A. I. R. 1920 P. C. 23.

(3) See *Re Pearson*, (1892) 2 Q. B. 263 ; *Re Clarke*, (1896) 2 Q. B. 476. See also Williams on Bankruptcy. 18th Ed. pp. 86 and 50.

of the principal. What it says is that it may be an act of the principal.

S. 11. The words "may be" at once suggest a limitation, being the one indicated in the Privy Council case of *Kasturchand v. Dhanpat Singh* (1). This limitation would not have been introduced if the words "carries on business either in person or through an agent" in section 11 of the Presidency-towns Insolvency Act were intended to confer jurisdiction over a foreigner carrying on business in British India through an agent. Section 11 of the Presidency-towns Insolvency Act defines merely the local jurisdiction of Insolvency Courts. It merely indicates the Court to which an insolvency petition should be presented. Before that stage is reached, the primary condition that the debtor has the capacity to commit the act of insolvency alleged against him must be satisfied. The capacity to commit an act of insolvency is not governed by section 11. That is a matter upon which the Indian Acts are silent, and it is to be determined with reference to the English law as it stood at the date when those Acts were passed (2)."

Personally works for gain.—These words give jurisdiction where a person lives outside the local limits of jurisdiction, but comes within them to work for gain as in the case of a pleader who lives outside the jurisdiction of the the High Court where he practises (3). The word "works" implies mental or physical efforts and does not apply to the receipt of offerings by a Hindu priest (4). The phrase "works for gain" is not applicable to the Secretary of State or to Government (5).

The question is one of fact and it is not possible to lay down any principle which will govern all cases. It is clear that a person may be working for gain in more than one place. The place where the payment is made to the petitioner is not the test, but it is one of the ingredients which have to be considered in determining where a person works for gain and in that connection the important point seems to be the place where the money is actually paid, and not the place where the pay sheets are made out or where payment may be regarded as notionally made. There must be some degree of permanency in the relation between the debtor and the places where he is alleged to work for gain. Thus, an engine driver driving his engine from Bhusawal to Igotpuri, and having only occasionally got to go through Bombay on duty (four or five times a month) residing and receiving his pay in Bhusawal, cannot be said to be working for gain within the local limits of the original jurisdiction of the Bombay High Court (6).

Or where he is in custody.—A debtor who has been arrested or imprisoned in execution of a decree may present an insolvency petition to the court having jurisdiction either in the local area where he is in custody or where he resides or carries on business. The word "or" in section 6, Provincial Insolvency Act, is used in the sense of giving the debtor an alternative choice. It does not restrict the debtor to present his insolvency petition only to the court within whose jurisdiction he is in custody (7).

(1) (1896) 22 I. A. 162 : 23 Cal. 26. See para 136.

(2) Mulla, 65, 66.

(3) *Raj Narain v. Newton*, (1873) 6 N. W. P. 43.

(4) *Goswami v. Goverdhan Lalji*, (1890) 14 Bom. 541.

(5) *Daya Narain v. Secretary of State*, (1887) 14 Cal. 256 followed in (1912) 40 Cal. 308 and *Govindarajulu Naidu v. Secretary of State*, A. I. R. 1927 Mad. 689.

(6) *Uderaj Boduram v. Clement Griffith Hall*, A. I. R. 1932 Bom. 432. (case under S. 11, Pt. I. A.)

(7) *Ghaneshdamdas v. Vishindevi*, 5 S. L. R. 259 : 15 I. C. 330.

Proviso : Objection as to place of presentment.—The proviso is new and was added to overrule *Madho Pershad v. A. L. Walton* (2), a case decided under the old Act. It is taken almost verbatim from section 21, Civil Procedure Code, 1908. In order that proceedings may be vitiated on the ground of presentation to the wrong court two matters must co-exist; the objection must be taken at the earliest possible opportunity and there must be a consequent failure of justice. If the objection was taken in the court which made the adjudication it cannot be taken notice of in appeal unless the court says that there has been a failure of justice (2). The presentation of the petition is not to the wrong court where the insolvent has been residing in different places and his ancestral house and lands are within the territorial jurisdiction of the court in which the petition is presented (3). In this case some of the difficulties on the actual application of the proviso were also explained, illustrated and criticised.

12. Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying complaints.

Verification of petition.

History.—This is section 6 (1) of the Act 3 of 1907 with the omission of the portion, "and the procedure laid down by the said Code with respect to the admission of complaints shall, so far as it is applicable, be followed in the case of such petitions." Section 6, Civil Procedure Code, provides for signing and verifying complaints. An application on behalf of a firm may be signed and verified by any one partner on behalf of the firm, *vide* Calcutta High Court rules 19, 22 and 24 (4).

Want of verification is not fatal to the application. It merely amounts to an irregularity which does not affect the merits of the case and which can be rectified by permitting the party concerned to make good the deficiency by amendment (5).

13. (1) Every insolvency petition presented by a debtor shall contain the following particulars, namely :—

Contents of petition.

- (a) a statement that the debtor is unable to pay his debts ;
- (b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody ;
- (c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an

(1) 18 C. W. N 1050.

(2) *Periya Karuppan v. Angappa Chettiar*, 86 I. C. 229 : 21 M. L. W. 52 : A. I. R. 1925 Mad. 483.

(3) *Kasi Iyer v. Official Receiver Tanjore*, A. I. R. 1926 Mad. 228.

(4) *Satis Chandra Addy v Firm of Rajnarain Pakhira and Rasikla Pakhira*, 72 I. C. 60.

(5) *Shib Deo Misra v. Ram Prasad*, 46 All. 637; *Ram Labhaya v. Firm Chanchal Singh*, 133 I. C. 626 : A. I. R. 1932 Lah. 28.

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order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made ;

- (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by, him ;
- (e) the amount and particulars of all his property, together with—
 - (i) a specification of the value of all such property not consisting of money ;
 - (ii) the place or places at which any such property is to be found ; and
 - (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;
- (f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—
 - (i) if such petition has been dismissed, the reasons for such dismissal, or
 - (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and if so, the grounds therefor.

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (b) of subsection (1), and shall also specify—

- (a) the act of insolvency committed by such debtor, together with the date of its commission ; and

- (b) the amount and particulars of his or their **S. 13.** pecuniary claim or claims against such debtor.

History.—This is section 11 of Act 3 of 1907 with the addition of clauses (f) with sub-clauses (1) and (2). Clause (f) was added in the new Act along with section 10, sub-section 2. In order to apply the latter provision it is necessary that the court should have the particulars mentioned in clause (f) before it.

Analogous Law.—It corresponds to section 15 of the Pt. I. A. and is mainly based upon section 6 (1) of the Bankruptcy Act of 1913.

Defective petition.—A defective petition where all the particulars required by the section, particularly dates and other particulars of alleged acts of insolvency, are not given should not be kept hanging over a man's head. The court should either insist on its amendment or else throw it out altogether (1). If, however, the particulars required by the section are given, the court has no power to refuse an order of adjudication on the ground that the particulars are not correct (2).

Amendment of petition.—See full notes under sections 5, 6, 7, 9 and 10.

Section 13 (1) (a).—It provides that a debtor's petition should contain a statement that the debtor is unable to pay his debts. Inability to pay debts was made a condition on which a debtor may petition under section 10 of the new Act. Under the old Act there was a difference of opinion as to whether a debtor's petition could be dismissed where he was not unable to pay his debts. It was held that if the debtor's statement in his petition to the effect that he was unable to pay his debts was found to be wrong, the court could dismiss the application (3). This was the law under section 351 of Civil Procedure Code, 1877, and that continued, according to this view the law under the Act 3 of 1907. Now by making it a condition precedent the Legislature has settled the question.

Section 13 (1) (b); (c) Jurisdiction.—As in a plaint, so in an insolvency petition the petitioner should show that the court has jurisdiction to entertain the petition. It obviously refers to section 11. It is provided in section 10 (b) and (c) that the arrest or imprisonment of a debtor or attachment of his property in execution of a decree of any court for the payment of money is one of the conditions which a debtor may satisfy to entitle him to present an application. In clause (c) he is required to give particulars relating to those clauses.

Clause (d).—In clause (d) the debtor is to set forth his liabilities in what is commonly called, a schedule of his liabilities.

Clause (e).—In clause (e) the debtor is to give particulars of all his property. The word "property" in this clause means property which is divisible among his creditors, or, in other words, property which vests in the court or receiver on the passing of the order of adjudication under section 28 of the Act. For that, see notes under section 28 clause (2). The court, after consideration of the schedule of the liabi-

(1) *Krishna Das Roy v. Charusila Pal and another*, A. I. R. 1932 Calcutta 290.

(2) *Laxmi Bank Ltd. v. Ramchandra Narayan Apte*, A. I. R. 1922 Bom. 80.

(3) *Laxmi Bank Ltd. v. Ramchandra Narayan Apte*, A. I. R. 1922 Bom. 80.

3. 14. lities and assets filed under clauses (d) and (e) respectively is to find out as to whether the debtor is unable to pay his debts. As to the limitations on the court's power of enquiry into the correctness of the statements made under section 13 before passing the order of adjudication see full notes under section 24, proviso. Under clause (e) (iii) the debtor is to give a declaration of his willingness to place at the disposal of the court all his property which is legally available for payment of his debts. Apart from this clause, it is provided in section 69, clause (a) that if the debtor wilfully fails to deliver up possession of any part of his property which is divisible among his creditors under this Act and which is for the time being in his possession or under his control to the court or to any person authorised by the court to take its possession, he shall be punishable on conviction with imprisonment which may extend to one year. The declaration of willingness to place at the disposal of the court all his property is required by the debtor as an evidence of his *bona fides* when he claims protection against ordinary processes available to his creditors against him for the realisation of their debts.

Clause (f).—This clause is new and should be read with sections 10 (2) and 25 (2).

Sub-section 2.—Sub-section 2 relates to the creditor's petition. The application must show that the court to whom the petition is presented has jurisdiction to entertain it under the Act. It should also specify the act of insolvency committed by such debtor together with the date of its commission and the amount and particulars of his, or, if there is more than one petitioning creditor, their pecuniary claim or claims against such debtor. The last two matters required to be put in a creditor's petition are necessary in view of section 9 which lays down the conditions on which a creditor may petition.

Act of insolvency and the date of its commission should be clearly specified in the petition.—For full notes see commentary under section 9.

When can a fresh application be made on the same facts—
Vide commentary under section 5 and section 10, sub-section (2).

14. No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

Withdrawal of petitions.

History.—This corresponds to section 7 of the Act 3 of 1907.

Analogous law.—Section 13 (8), Pt. I. A. provides that a creditor's petition shall not, after presentation, be withdrawn without the leave of the court and in section 15 (2) of the same Act similar provision is made in respect of a debtor's petition. Similar provisions exist in sections 5 (7) and 6 (2) of the Bankruptcy Act of 1914.

Object.—The petition once presented, the petitioner is no longer in unfettered control of it. The insolvency proceedings are for the administration of the estate of the debtor, for the benefit of not any particular creditor but for the general body of creditors. Very often petitions are made not with the *bona fide* intention of getting the debtor's estate administered under the insolvency laws but for the collateral purpose of bringing pressure to bear upon the debtor. It is to check

this abuse of the process of the court that the section has been enacted (1). The court has discretion in the matter of granting leave for the withdrawal of a petition. Each case is to be decided on its own merits. In considering an application under the section the court should see whether the interests of the general body of the creditors are served thereby or not. The mere fact that the insolvent has settled with the creditors is not enough for granting such leave (2). Thus a creditor has no right to get his debtor adjudicated insolvent and then to receive from him a sum in adjustment of his claim. He is not entitled to use his petition as a lever to secure preferential treatment for himself, nor is it permissible for an insolvent, once an act of insolvency has been committed, to say that the act was discounted because he had gone round to his admitted creditors and forced upon them a compromise or adjustment (3). Non-petitioning creditors can oppose an application by the petitioning creditors to withdraw their petition under section 14. And if the insolvency Judge decides in favour of withdrawal, they have a *locus standi* to appeal to the District Judge.

14.

Withdrawal of insolvency petition after an order of adjudication.—An insolvency petition cannot, even with the leave of the court, be withdrawn after an order of adjudication has been passed against the debtor. Once an order of adjudication has been made, the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge. (4). The reasons for so holding were stated by Pratt J. C. in *In re Fleming Shaw and Co.*, (5) in the following words: "I am of opinion that leave to withdraw cannot be given under section 7 (Act 3 of 1907) after an adjudication order has been made. It is urged that under the English Bankruptcy Act, leave to withdraw may be given after a receiving order has been made. But even if that is so, that is not an analogous case, for a receiving order does not make the debtor a bankrupt or deprive him of legal title to his property. Here the withdrawal of petition would be of no avail unless it implies an annulment of adjudication. The Act has specified in section 42 the conditions on which the Court may annul an adjudication, and it is impossible that it was intended that this same result could be produced by the simple device of withdrawing the original petition. The position of the section in the Act shows that it was intended that the power of withdrawal should be exercised before the stage of sections 15 and 16 has been arrived at. No suit can be withdrawn after judgment has been pronounced and a decree made, and it seems to me that it would be equally absurd to allow an insolvency petition to be withdrawn after an adjudication order has been made."

Under the Insolvency Act, a practice had once been established in the High Court of Bombay of allowing an insolvent to apply for leave to withdraw his petition on serving notices on all his creditors in the schedule, and if no creditor appeared to oppose the application leave was granted

(1) *Gadigi Mudappa v. Parmeswara Bhat*, A. I. R. 1925 Mad. 242 : 85 Ind. Cas. 303.

(2) *In re Subrati Jan Mahomed*, A. I. R. 1914 Bom. 188.

(3) *Shivlal Rathi Insolvent*, *In re*, A. I. R. 1917 Bom. 239 (2); *Ko Maung Gyi v. P. L. M. Chettyar Firm*, A. I. R. 1929 Rang. 333.

(4) *In re Subrati Jan Mahomed*, A. I. R. 1914 Bom. 188; 38 Bom. 200 : 20 I. C. 859; *Fleming Shaw & Co.*, and another, *In the matter of*, A. I. R. 1916 Sind 52; *(Maung) Myint v. Official Assignee*, A. I. R. 1929 Rang. 338 : 127 I. C. 172.

(5) A. I. R. 1916 Sind 50

S. 15. as a matter of course. The court did not concern itself with the conduct of the insolvent or the manner in which he had settled the claims of his creditors. It is now the duty of the court to scrutinize the conduct of every insolvent who applies either for an order of discharge or for the annulment of the adjudication order (1).

If the petitioning creditor, after having settled his claim with the insolvent out of court does not press the prosecution of his application, the act of bankruptcy committed by the debtor would be available to any other creditor to be substituted in the place of the petitioning creditor to support his petition (2). An arrangement come to by a debtor with his creditors will not justify a court in allowing an insolvent to withdraw his petition. If, however, all the parties concerned desire to take the matter out of the hands of the court, the petition may be dismissed (3). Any private arrangement with creditors and payment in accordance therewith cannot be recognised in insolvency proceedings (4).

15. Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit.

History and analogous law.—This is section 8 of Act 3 of 1907. It corresponds to section 91, Presidency Towns Insolvency Act and section 110, Bankruptcy Act, 1914.

Object and scope of the section.—This is a rule based on convenience. It is intended to avoid separate administrations of the estate of the same debtor or joint debtors. It is within the discretion of the court to pass an order under this section according as the circumstances may demand. Thus, where a member of a partnership dies insolvent and an order is made under section 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the proceedings against the estate can be consolidated (5). Under the Presidency-towns Insolvency Act, it is expressly provided by section 97 that where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, any other insolvency petition against or by a partner in the same firm shall be presented in, or transferred to the court in which the first mentioned petition is in course of prosecution and such court may give such directions for consolidating the proceedings under the petitions as it thinks just. There is no such provision in the Act. But for the purposes of the section partners can be treated as joint debtors and an order of consolidation can be passed.

"The Court."—It appears that section 5 will apply in terms only where the petitions are made to the same court. Where there are separate petitions in courts of concurrent jurisdiction under the Provincial

(1) *In re Subrati Jan Mahomed*, A. I. R. 1914 Bombay 188.

(2) *Robson on Bankruptcy*.

(3) *In re Pyari Chand*, 6 B. . R. 558.

(4) *Beharilal Sikdar v. Harsukdas Chakmall*, 25 C. W. N. 197 : 61 I. . 904.

(5) *Re C. Greaves, Re W. H. Greaves, Ex parte Official Receiver*, (1904) 2 K. B. 493.

Insolvency Act provisions of Civil Procedure Code relating to transfer can be put into motion for achieving the same purpose. Where the two courts are subordinate to the same High Court or the District Court, section 24, Civil Procedure Code will apply. If the two courts are subordinate to different High Courts the application shall be made to the High Court within the local limits of whose jurisdiction any one of such courts is situate *vide* section 23, Civil Procedure Code. If one petition is pending in a High Court in the exercise of its ordinary original civil jurisdiction and another petition is pending in any other court subject to the superintendence of that High Court, the proceedings in the subordinate court can be stayed by the High Court Insolvency Judge under section 18-A, Presidency-towns Insolvency Act (1909).

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Order of consolidation to be made only after the petitions have been admitted.—Section 15 does not empower the court to pass an order of consolidation of a petition for insolvency before it is admitted and before an opportunity has been offered to the other parties concerned for showing that the petition is not competent. *Prima facie* that section refers to consolidation of insolvency petitions after they are admitted, and presupposes that such petitions are otherwise competent. Where the competency of the petitions is being challenged it must be inquired into before an order of consolidation can be passed (1).

Single petition against more than one person.—It has been held that such a petition is maintainable under certain conditions ; for full notes see commentary under section 9. The present section recognises the convenience which may result by the administration of the estate of joint debtors in one proceeding. The section so far as it goes supports the above view.

16. Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

Power to change carriage of proceedings.

Previous history and analogous law.—This is section 9 of Act 3 of 1907 (2). It corresponds to section 93, Presidency-towns Insolvency Act and section 111, Bankruptcy Act, 1914.

"Petitioner."—The petitioner means the petitioning creditor.

Object.—The section is intended to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. It is not difficult to imagine the case of a creditor, who has presented the application for insolvency against the debtor, having entered into a private treaty with his debtor, not prosecuting his application with diligence and allowing it to be struck off for default. This may no doubt enure to the benefit of the creditor and to the advantage of the debtor inasmuch as it saves his voluntary and gratuitous transfers within two years from the date of the presentation of the application, and transfers by way of fraudulent preference within three months from the date thereof,

(1) Dayaram Menghraj v. Sakhibai, 130 I. C. 559 : A. I. R. 1931 Sind 65,

(2) In the matter of Haroon Mahomed, Insolvent, 14 Bom. 189.

S. 16 but it will not be to the advantage of the general body of creditors. The creditor presenting the petition is considered to prosecute the petition not only for his own benefit but also for the benefit of the creditors generally.

Conditions on which substitution may be made.—1. The section is to be applied only when the petitioner does not proceed with due diligence on his petition.

2. The debtor should be indebted to the substituted creditor in the amount required by this Act in the case of a petitioning creditor.

3. The debt of the substituted creditor is a good debt though barred by time on the date of substitution provided it was enforceable on the date of the original petition. If the original petition had proceeded upto adjudication, or if another creditor, whose debt is not barred by the date of substitution, is substituted, and an order of adjudication obtained, the debt of the substituted creditor which had not become barred by the date of the petition can be proved. If so, there is no reason why he cannot be substituted. The words "as petitioner" in the section show that on substitution the petition becomes his petition with the original date and it is enough if the debt was an enforceable debt on the original date (1).

Limitation for substitution.—The only condition necessary for substituting one creditor in place of the petitioning creditor who does not proceed on his petition is that his debt shall be not less than the amount required by this Act. The amount referred to is required by section 9 of the Act, and it would be indeed remarkable if the legislature had intended to prescribe all the conditions set forth in section 9 and yet to mention only this. It is, therefore, open to the insolvency court to substitute another creditor in place of the original petitioning creditor, although the application of the former for being so substituted is made more than three months after the act of insolvency on which the petition of the latter is grounded (2). The effect of such substitution would be that the substituted creditor takes the place of the first petitioner *ab initio* and is entitled to prosecute the original petition as if it were his own petition so that no question or the necessity for a fresh act of insolvency could arise (3).

English cases :—*In re Maugham, 1888, 21 Q. B. D. 21* and *In re Maund, 1895, 1 Q. B. 194*, considered.—The Indian authorities apparently lay down a rule contrary to that laid down in English cases under section 105 of the Bankruptcy Act, 1883, which corresponds to the present section ; but on closer examination, it will be clear that in fact it is not so. In the first case the act of bankruptcy on which the petition was founded was the execution by the debtor of a deed of assignment for the benefit of the general body of his creditors. The petition was dismissed by the Registrar on the ground that the petitioning creditors had assented to the deed. More than three months after the execution of the deed two non-assenting creditors applied to the County Court Judge to rescind the order dismissing the petition and asked that their names might be substituted for those of the original petitioning creditors under section 107 of the Bankruptcy Act, 1883. The County Court Judge made the

(1) (Dinavahai) Venkata Hanumantha Rao v. Yerugulapati Gangayya, A. I. R. 19.8 Mad. 608; Salamatmal Janimal v. Chetumal Bulchand, A. I. R. 1932 Sind 161; 139 I. C. 851.

(2) (Bohra) Ganga Nath v. Kunwar Zalim Singh, A. I. R. 1932 All. 147.

(3) L. C. T. R. M. Sathappa Chettyar and another v. A. S. Chettyar Firm and others, A. I. R. 1929 Rang. 291.

order, but it was reversed on appeal on the ground that he had no jurisdiction to review or rescind the order made by the Registrar. In the course of his judgment Cave, J. said : "The petition had been dismissed on October 11, and no one could then present a petition founded on the acts of bankruptcy constituted by the execution of the deed of assignment, as more than three months had elapsed." § 17.

In the second case certain creditors filed a petition on 16th May, 1894, alleging that an act of bankruptcy had been committed on 5th March 1894. On 15th June an application to add the names of two other persons as petitioning creditors was made, the reason for that application being that there was a doubt whether the amount of the debts due to the creditors who had filed the petition was sufficient to entitle them to present it. On these facts it was held that the power ought not to be exercised after the lapse of three months from the date of the act of bankruptcy.

It will be thus seen that in the first case the application for substitution was dismissed because the insolvency proceedings had been terminated by the dismissal of the original petition and in the second case the petition was dismissed because section 107, Bankruptcy Act, 1883, was sought to be used in a manner as to over-ride the provisions of the Act, corresponding to section 9 (1) (c) of the present Act. In all the Indian rulings mentioned above, the original petition was validly presented and at the time when substitution was ordered the insolvency proceedings were still pending.

Section applies to pending insolvency proceedings only.—A creditor had filed a petition for adjudication. It was, however, subsequently intimated to the court that the petitioning creditor and the insolvents had come to an agreement with regard to this matter ; on this intimation the petition was dismissed by the court. No other creditor was given notice of the application based on the settlement which resulted in the dismissal of the petition. Some months later another creditor applied to be substituted for the original petitioning creditor. It was held that the language of the section contemplates a petition that is alive and not dead, a petition that is proceeding and has not been dismissed, that the subsequent creditor could not be substituted in place of the original petitioner and that the only course open to him was to launch a fresh petition (1).

Effect of substitution.—The effect of substitution is that the substituted creditor shall be treated as if he had been the original petitioner for all purposes. The act of bankruptcy committed by the debtor would be available to him (2), even though the substitution has been ordered after three months of the commission of the act of insolvency (3).

17. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and dis-

Continuance of proceedings on death of debtor.

(1) Maung Gye v. A. L. K. P. Chettyar Firm, 11 Rang. 407 : A. I. R. 1933 Rang. 251. See also *Ex parte* Maugham, 1883, 21 Q. B. D. 21.

(2) Robson (from Ghosh).

(3) Ganga Nath v. Kunwar Zalim Singh, 54 All. 72 : 1931 All. L. J. 1039 : 135 I. C. 250 : A. I. R. 1932 All. 147.

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History.—There was no corresponding provision in the Indian Insolvent Act; yet it was held in cases arising under that Act that the death of the insolvent had no effect on the proceedings in his insolvency or in the powers of the Official Assignee, and that, in the legal aspect of the matter, the natural existence of the insolvent is for the purpose of dealing with his estate, artificially continued in the Official Assignee, who can after the insolvent's death deal with the estate as he could have dealt with it, had the insolvent been still alive (1). Section 10 of Act 3 of 1907 provided that if a debtor by or against whom an insolvency petition had been presented died the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive. In the present Act the words "as if he were alive" have been replaced by the words "so far as may be necessary for the realisation and distribution of the property of the debtor." The amendment was made in order to obviate any objection that may be put forward to the continuance of the proceedings by reason of some of the provisions contained in the Provincial Insolvency Act such as those in section 47 with regard to the application for discharge. A deceased person cannot apply for discharge. If the words "as if he were alive" were in the section, it might have been contended that, no application having been made within the time fixed by the court for discharge, the adjudication should be annulled. There are other provisions in the Act with regard to the conduct of the insolvent. All that is necessary after the insolvent's death is to see that the assets of the insolvent are realised and distributed among the creditors. The court is not interested after the insolvent's death in considering his conduct except in so far as applications for setting aside fraudulent preferences and fraudulent alienations are concerned (2).

Analogous Law.—The old section 10 was the same as the present S. 93, Pt. I. A. which corresponds to S. 108, Bankruptcy Act, 1883, and S. 112, Bankruptcy Act, 1914. S. 108, Pt. I. A. and S. 130, B. A. of 1914, contain provisions for the administration in insolvency of the estates of persons who have died insolvent. There are no such provisions in the Provincial Insolvency Act.

"By or against whom".—These words mean that proceedings against a debtor can be continued after his death; it is immaterial that the petition is presented by the debtor or a creditor (3). In an English case (4), it was held by a Divisional Court, consisting of Cave, J. and Grantham, J. that section 103 could only apply to the case of a debtor who has presented an insolvency petition and not to a person against whom an insolvency petition has been presented. This case is against the clear words of the section and should not be followed (5). The above English case was also not followed in *in re Hardy, Hardy v. Farmer* (6).

(1) *Fakir Chand Moti Chand v. Moti Chand Hurruck Chand*, 1883, 7 Bom 439; *In re Sita Ram Abbaji*, 10 Bom. H. C. Rep. 58; *In re Ramsabuck Misser*, 6 Beng. L. R. 119. referred to in 7 Bom. 438.

(2) *Ramathai Anni v. K. Kanniappa Mudaliar*, A. I. R. 1928 Mad. 480 at page 482.

(3) A. I. R. 1928 Mad. 480. *supra*.

(4) *Ex parte Sharp*, (1886) 34 W. R. 550.

(5) A. I. R. 1928 Mad. 480, *supra*.

(6) (1896) 1 Ch. 904: 65 L. J. Ch. 461: 3 Manson 150: 14 W. R. 503: 74 L. T. 403.

"The proceedings in the matter."—Where the debtor dies after the presentation and before the order of adjudication, the question arises as to whether the deceased can be declared insolvent. It has been held that the words "proceedings in the matter" embrace the passing of an order of adjudication under section 28 in respect of a deceased insolvent (1). It is necessary that an order of adjudication should be passed because without such an order it is not possible to realise and distribute the property of the debtor. "Assets of the insolvent cannot be realised unless his estate vests in the Official Receiver, for no person could sell what is not vested in him; and the property of the insolvent vests in the court only on an adjudication under the Provincial Insolvency Act; and the court by an order vests the property in the Official Receiver. If there is no vesting of the property in the court or in the Official Receiver how could the court or Receiver proceed to realise the insolvent's assets? The order of adjudication is, therefore, essential for the realisation and distribution of the property of the debtor" (2). The same is settled law under the Presidency-towns Insolvency Act and under the English Act, and there is no reason to assume that the law according to the Provincial Insolvency Act should be understood in a different way from the law according to the Presidency-towns Insolvency Act (3).

In A. I. R. 1928 Calcutta 21 (4), Page, J. applied the corresponding section 93, Pt. I. A., to facts which are stronger. There, after the acceptance and approval of a scheme of composition the adjudication of the debtor had been annulled. The debtor died after that and a person interested in the scheme applied that the debtor be re-adjudged insolvent. The application was granted on the ground that re-adjudication is not independent of the original insolvency, but only a revival of the latter. The proper order of adjudication to make under the section is to adjudge the deceased insolvent and to order his property to vest in the Official Receiver. It is improper to adjudge the estate of the deceased as insolvent. Where the judge had passed such an order it was held that the order was merely wrong in form and should be maintained (5). In proceedings against a deceased debtor under the section the Official Receiver can apply under sections 53 and 54 to set aside alienations effected by the debtor (6).

Effect of the debtor's death after adjudication.—It was held under the Indian Insolvent Act that the death of the debtor after the vesting of the property in the Official Assignee has no effect on the proceedings in his insolvency or on the powers of the Official Assignee. It was further held that ancestral estate of the debtor previously vested in the Official Assignee is not thereby divested from him and vested in the son by right of survivorship (7). This view was followed in *Lachhman Dass*

(1) *Muthu Veerappa Chettiar v. Sivagurantha Pillai*, 49 Mad. 217 : 92 I. C. 603 : A. I. R. 1926 Mad. 133 ; *Venkatarama Ayyar v. The Official Receiver, Tinnevely*, 51 Mad. 344 : 109 I. C. 94 : A. I. R. 1928 Mad. 476 (2) ; *Ramesh Chandra Sil v. Charu Chanira Mohuri*, 34 C. W. N. 445 ; A. I. R. 1930 Cal. 590 ; *Girdhari Lal v. Jugal Kishore*, 33 P. L. R. 151 : A. R. 1932 Lah. 269 : 136 I. C. 733 : A. I. R. 1932 Lah. 264 ; (*Re Walker*, (1886) 54 L. T. 682, Rel. on) ; *Amar Nath v. Harbans Singh*, I. R. 1932 Lah. 652 (2).

(2) A. I. R. 1928 Mad. 480 at page 483 Cl. 1.

(3) *Venkata Rama Ayyar v. Official Receiver*, A. I. R. 1928 Mad. 476 (2).

(4) *Krishna Kishore Adhicary and another, In re*.

(5) *Subbiah Aiyar v. Official Receiver Tinnevely*, 1932 M. W. N. 1102 : 63 M. L. J. 727 : A. I. R. 1933 Mad. 25.

(6) A. I. R. 1928 Mad. 480, at page 483 Col. 2 ; A. I. R. 1933 Mad. 25. *supra*.

(7) See footnote (1) on page 148.

S. 17. *v. Jai Singh*, (1) and *In re Khoja Ibrahim Lalji* (2), cases decided under the Act 3 of 1907. Under the present Act also it has been held that on the death of an insolvent whose property has vested in the Receiver, the Receiver is not divested of that property. The heirs of the insolvent governed by Hindu Law can bring a suit to show that the insolvent's debts were tainted with immorality, or were otherwise not binding upon them; but in other respects, the insolvent's death does not affect the insolvency proceedings (3).

Rights of the legal representatives of the deceased debtor.—In *Ranjass v. Katta Singh* (4), a case arising under Act 3 of 1907, it was held that the proceedings in insolvency do not abate by reason of the death of the insolvent and that the court has power to bring on the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent. For this opinion, reliance was placed on S. 47, P. I. A. (1907), corresponding to section 5 of the present Act. On general principles too, the rule is sound (5). The insolvent is a party to the insolvency proceedings under the Provincial Insolvency Act; he does not altogether disappear from the picture as is the case in England. So long as the insolvent has a voice or a right to participate in insolvency proceedings, that right devolves on the legal representatives on his death. The court is, however, not bound to bring the legal representatives on the record in each and every case (6). The rulings in A. I. R. 1928 Lah. 119 (1) (7) and A. I. R. 1932 Lah. 121 (1) (8) it is submitted with respect, do not lay down correct law.

In the first case the debtor had died after his adjudication by the trial court on his own petition and before an appeal filed by some of the creditors against the order of adjudication to the High Court was decided. Following (1888) 69 P. R. 1888 it was held that the appeal abated because the right to sue did not survive within the meaning of order 22 rule 4 C. P. C. on the death of an insolvent respondent. The second case purports to follow the first one. S. 17, P. I. A. (1920) was brought to the notice of the learned judges who decided the first case but it appears that it was distinguished on quite insufficient grounds. As already stated, it has been held both under the English and Indian Acts that where the debtor dies after the presentation of an insolvency petition and before his adjudication, the court can adjudge the deceased debtor insolvent. On this view it is clear that section 17 overrides order 22 rule 4 C. P. C. which is to be applied under section 5 of the Act only if it is not inconsistent with the specific provisions of the Act. On account of the special provision made in section 17, the right to sue and, therefore, the right to present the insolvency petition does not abate on the death of the debtor. What is true of the proceedings of the original court is applicable to proceedings in appeal (9).

(1) A. I. R. 1922 Lah. 399.

(2) 9 I. C. 683.

(3) *Gokal Singh v. Shiv Ram and others*, A. I. R. 1925 Lah. 366 (1); *Mirza and another v. Jhanda Ram and others*, A. I. R. 1930 Lah. 1034.

(4) A. I. R. 1921 Lah. 331 (2).

(5) *Sripat Singh v. Prodyat Kumar*, A. I. R. 1921 Cal. 219. (a case under the Act 3 of 1907.)

(6) *Fakir Muhammad v. Amir Chand and others*, A. I. R. 1921 Lah. 223 (2).

(7) *Narain Singh v. Gurbakhsh Singh*.

(8) *Attar Chand v. Mian Muhammad Mobin*.

(9) *Lala Piarey Lal v. Mohammad Sulamat Ullah Khan*, A. I. R. 1937 All. 435.

Termination of proceedings in the case of a deceased insolvent debtor.—A legal proceeding is said to be pending as soon as it is commenced, and until it is concluded, that is, so long as the court having original cognisance of it can make an order on the matters in issue or to be dealt with therein. And insolvency proceedings would be considered as still pending where the Receiver has not yet been discharged and the insolvent has not yet applied for and obtained his discharge (1). The matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held terminated (2).

18. The procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of complaints, shall so far as it is applicable, be followed in the case of insolvency petitions.

This is the latter portion of section 6 (1) of Act 3 of 1907. The procedure laid down in the Code of Civil Procedure, with regard to the admission of complaints, must, so far as it is applicable, be followed in the case of an insolvency petition, whether presented by a debtor or a creditor. The rules as to the admission of complaints are laid down in Order 4 rule 1 and Order 7, rule 9 of the Code.

19. (1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

(2) Notice of the order under sub section (1) shall be given to creditors in such manner as may be prescribed

(3) Where the debtor is not the petitioner, notice of the order under sub-section (1) shall be served on him in the manner provided for the service of summons.

History.—This is section 12 of the old Act 3 of 1907 except that the words “by publication in the Local Official Gazette, and” have been omitted in clause (2).

Sub-Section 2; Notice to Creditors.—There is nothing in s. 12 (3), P. I. A. (1907) to warrant the contention that in the case of a petition filed by a creditor to adjudge his debtor an insolvent, notice to other creditors is not necessary under section 12 sub-section (1) (3).

All that that sub-section requires is that there should be a general notice to creditors. The law does not require that every creditor should be served with a notice individually, on a petition made by a creditor. Under section 13 it is not necessary for a creditor to mention the names

(1) *Jivanji Momooji v. Ghulam Hussain Sheikh Tayab*, A. I. R., 1918 Sind 33.

(2) *Asa Nand v. Bishan Singh and others*, A. I. R. 1933 Lahore 997.

(3) *V. R. M. K. M. T. Muthukaruppan Chettiar v. Muthuraman Chettiar*, A. I. R. 1915 Mad. 589: 26 I. C. 282; *Nachiappa Chetti v. Rangavelu Chetty*, A. I. R. 1917 M. 203: 34 I. C. 696; *Darrah v. Fazal Ahmad*, 93 I. C. 903: A. J. R. 1926 Lah. 360.

5. 19 of the other creditors. Only a general notice is, therefore, possible,
- (2). Where the petition is presented by a debtor, section 13 clause (d) requires him to give the names and residences of his creditors so far as they are known to, or can, by the exercise of reasonable care and diligence, be ascertained by him. On a debtor's petition, therefore, notice to individual creditors is possible. On a creditor's petition it is possible for the court under S. 22 P. I. A. (1920) to call upon the debtor for the list of his creditors but this power should not be exercised before the court is satisfied that the creditor has a right to make the petition. It is unfair on the part of the court to order the debtor in every case to file inventories of his property and list of debts due from him to others, without the petitioning creditors having first established their right to present the petition. In the absence of circumstances to justify such an order, it is necessary for the court to proceed under section 24 by calling upon the petitioning creditors to establish their rights as defined in section 19 to present the petition before taking to any other action against the debtor (1). In this connection, attention may be drawn to rule 5 framed by the Bombay High Court under S. 79, P. I. A., 1920. The second part of this rule provides that where an insolvency petition presented by a creditor is admitted, a copy of which shall be served together with the notice of the order fixing the date for hearing the petition on the debtor; and such notice may, in the discretion of the court, require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from the date of service of notice as the court shall determine. A private notice to a creditor in the absence of a general notice is not enough (2). Under the present Act it appears that private notice is enough so far as that creditor is concerned. Under the old Act general notice was necessary by the section itself.

In such manner as may be prescribed.—"Prescribed" means prescribed by rules framed under S. 79, P. I. A. (1920) *vide* section 2, sub-section (1) (c). For rules, see rule 5 (Cal) and rule 5 of the Allahabad High Court. These rules provide that a copy of the notice shall also be forwarded by a registered letter to each creditor at the address given in the petition. Where a letter, properly directed, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed and that presumption would apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that the receipt for the letter is produced and signed on behalf of the addressee himself (3). Where the addressee of a letter containing notice to quit, sent through the post office by a registered post refuses to take delivery, a court would be entitled under section 114, I. E. A. to presume that the letter reached him in the ordinary course. The fact that the letter was returned to the sender, not through the Dead Letter Office, but as a letter which the addressee had refused to accept would not destroy the presumption (4).

(1) Ganesh Das *v.* Khilanda Ram, A. I. R. 1929 Lah. 636 : 119 I. C. 753.

(2) Nachiappa Chetty *v.* Rangavelu Chetty, A. I. R. 1917 Mad. 203 : 34 I. C. 696 (case under Act 3 of 1907).

(3) Harihar Banerji *v.* Ramshashi Ray, A. I. R. 1918 P. C. 102 : 46 Cal. 458 : 48 I. C. 277 (a case under T. P. A., S. 106).

(4) Girish Chandra Ghose *v.* Kishore Mohan Das, A. I. R. 1920 Calcutta 237 (2) : 54 I. C. 5.

Where no rules are framed under the new Act 5 of 1920, the old S. 13 rules under the Act of 1907 hold good where they are not inconsistent with the new Act. Having regard to rule 5 framed by the Lahore High Court under the Act of 1907, it was held that the notification of a petition for insolvency in the local official Gazette is not illegal (1).

Want of notice ; Its effect.—Under Ss. 344 and 588, C. P. C., 1882, where a petitioner was declared to be an insolvent on the very day on which the application was made without issuing any notice to the creditors, it was held that the order was bad for want of notice and it was accordingly set aside. Under the Act 3 of 1907 also it has been held that an order for adjudication, passed without a general notice to creditors, is wholly irregular and should be set aside. The omission to serve the notice contemplated by S. 13 (4), P-t I. A. is not a formal defect or irregularity within section 118 of that Act. It is of fundamental importance that an adjudication order should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him and the burden lies upon the creditor to establish that the insolvent has waived the defect caused by the non-service of the notice (2). S. 24, P. I. A. supports this view. There it is provided that on the date fixed for the hearing of the petition the court should require proof of the following matters, namely ;—

(a) that the creditor is entitled to present the petition ;

(b) that the debtor, if he does not appear on the petition presented by a creditor, has been served with notice of the order admitting the petition ; and

(c) that the debtor has committed the act of insolvency alleged by him.

Necessity for notice to the debtor on a creditor's petition has been placed on the same footing as proving the commission of an act of insolvency by the debtor. It is settled law that the debtor, unless the commission of an act of insolvency on his part has been established, cannot be adjudged insolvent. By similar reasoning want of notice to the debtor will be fatal to the validity of an order of adjudication. Under section 19 notice to creditors and notice to debtor have both been provided. The mode of service in the two cases may be somewhat different but the object appears to be the same.

In A. I. R. 1935 Lah. 412 (3) it was held that the absence of the requisite notice under section 19 to a debtor, who has been adjudged insolvent, cannot be made a ground for setting aside the order of adjudication unless it has led to any prejudice. It appears from the judgment that the learned judge did not agree with the rule laid down in A. I. R. 1915 Mad. 589 (1) (4) and A. I. R. 1917 Mad. 203 (2) (5). It is unfortunate that his attention was not drawn to S. 24, P. I. A. (1920) which places notice to a debtor on the same footing and makes it as important as the commission of an act of insolvency or the creditor's right to

(1) S. R. Darrah v. Fazal Ahmad A. I. R. 1926 Lahore 360 : 93 I. C. 903.

(2) Nathmull v. Ganeshmull Jivanmull, A. I. R. 1921 Cal. 106 : 66 I. C. 886, (under the Presidency towns Insolvency Act, 1909).

(3) Jhanda Singh v. Receiver, Insolvent's Estate Amritsar, A. I. R. 1935 589 : Lah. 412 : 158 I. C. 94.

(4) Muthu Karuppan Chettiar v. Muthu Raman Chettiar, A. I. R. 1915 Mad. 26 I. C. 282.

(5) Nachiappa Chetty v. Thangavelu Chetty, A. I. R. 1917 Mad. 203 : 24 I. C. 696.

S. 20, present the petition under section 9 of the Act. It is true that ordinarily want of notice is considered to be an irregularity in the absence of prejudice but a notice of this description at the initial stage should not be regarded as something the omission of which may be treated as a mere formal defect or irregularity (1).

20. The Court when making an order admitting the petition may, and where the Appointment of debtor is the petitioner ordinarily interim receiver. shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908. as the Court may direct. If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of this sub-section shall apply accordingly.

History.—The section is new. Section 13 (2) of the Act 3 of 1907 provided that at the time of admitting an insolvency petition or, at any subsequent time after adjudication, the court may, either of its own motion or on the application of any creditor, order the appointment of an interim receiver of the property of the debtor, or of any part thereof. In section 18 provision for the appointment of the receiver at the time of passing an order of adjudication or, at any time afterwards, was made. The powers of the interim receiver were, however, not defined anywhere in the Act. When the old Act was repealed and the new Act was put on the statute book, section 20 took the place of section 13 clause (2) and a new clause (5) was added to section 56 which corresponds to S. 18, P. I. A., 1907. Now the law in the mufassil has been brought in line with that under the Pt. I. A., 1909.

Analogous law.—The section corresponds to section 16, Pt. I. A., 1909) and section 8 of the Bankruptcy Act, 1914.

Object of the section.—The object of the section is to preserve the assets for the benefit of the general body of creditors. With the order of adjudication the whole property of the insolvent vests in the receiver and the debtor ceases to have any interest in the property. During the pendency of the insolvency proceedings between the time of the presentation of the petition and the passing of the order of adjudication it becomes desirable, and even necessary in certain cases, to protect the estate of the debtor for the benefit of the entire body of creditors (2).

Powers of interim receiver defined.—It is provided in the section that the interim receiver shall have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the court may direct. Again section 56, clause (5) enacts that the provisions of

(1) *Ex parte* Jerningham, (1878) 9 Ch. D. 466 : 47 L. J. B. K. 115 : 39 L. T. 186 : 27 W. R. 157 (decided under another statute).

(2) *Madhu Sardar v. Khitish Chandra Banerjee*, A. I. R. 1915 Cal. 734 : 42 Cal. 289 : 30 I. C. 82.

that section shall apply, so far as may be, to interim receivers appointed under section 20. It is not an easy task to reconcile and exactly define the powers which an interim receiver may derive from these two sources. In the Code of Civil Procedure the subject of appointment of receivers is dealt with under Order 40. Order 40, rule 1 runs as follows :—

“(1) Where it appears to the Court to be just and convenient, the Court may by order—

(a) appoint a receiver of any property, whether before or after decree ;

(b) remove any person from the possession or custody of the property ;

(c) commit the same to the possession, custody or management of the receiver ; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.”

The wording of section 20 as well as Order 40 rule 1 suggests that the mere fact of the appointment of a receiver does not confer upon him all the powers of which mention is made in Order 40 rule 1 (1). It is the court which can remove any person from the possession or the custody of the property or commit the same to the possession, custody or management of the receiver and it is the court which has to confer upon the receiver all such powers in relation to property as the owner himself has or such of those powers as the court thinks fit. Section 56 clause (3) is made up of clauses (b) and sub-section 2 of Order 40 rule 1. The object of enacting sub-section 5 of section 56 is to assimilate the position and powers of an interim receiver with that of a receiver appointed after adjudication as far as it is not inconsistent with the general scheme of the Act. The clause should be liberally construed and all the acts which a receiver under section 56 is authorized to do under the provisions of the Act (with just exceptions) should be considered within the competency of the interim receiver.

With these preliminary observations we proceed to discuss the powers of the interim receiver in detail

Right to apply for setting aside a sale under order 21 rule 89 Civil Procedure Code.—It has been held that an interim receiver, by virtue of his appointment under section 20, Provincial Insolvency Act (1920) has no power to act under O 21 r. 89, C. P. C. in the absence of the court's order authorizing him to so act (2). In the case just cited the interim receiver was appointed after the

(1) *Takhiram Surajmall Firm v. Chouthmal Bhagirath*, 9 Patna 945 : 130 I. C. 38 : A. I. R. 1931 Pat. 70 ; *G. R. Subramania Aiyar v. Official Receiver Tanjore*, A. I. R. 1926 Mad. 432 : 23 I. C. 877, (dissented from on another point in A. I. R. 1932 Mad. 95.)

(2) *Ramachandra Aiyar v. Sankara Aiyar*, A. I. R. 1926 Mad. 357 : 93 I. C. 271 ; *Goginini Ankayya v. Official Receiver Masulipatam*, A. I. R. 1937 Mad. 593.

S. 20. sale and could not be said by his appointment to have had an interest by virtue of a title acquired before the sale, and he could only come in under Order 21 rule 89 as an owner of the property. An interim receiver can, by no stretch of language, be said to be the owner of the property of which he is the receiver. It was further stated that the word "confer" in sub-clause (d) of Order 40 rule 1 would seem to suggest that until the court make a specific order the receiver is not inherently endowed with a right to sue. But even if it is held that mere possession gives such right, it would not extend to making an application under O. 21 r. 89, C. P. C. because mere possession cannot be said to put the receiver in the position of the owner.

Right to apply for setting aside a sale under Order 21 rule 90, Civil Procedure Code—It has been held that where an interim receiver is in possession of the property sold he can apply under O. 21 r. 90, C. P. C. even in the absence of a specific order of the court (1). The interim receiver has very much the same rights and liabilities as a receiver under section 56. The receiver has the duty of maintaining the property as it was when it came into his hands and it cannot be said that his interests are unaffected when such duties cannot properly be fulfilled. If property passes away from the judgment-debtor to another person there is distinct loss to the estate entrusted to the receiver, who can be made liable to make up such loss. The word "interests," as occurring in O. 21 r. 90 C. P. C., need not be interpreted as interest in the property itself. The word used is "interests" in the plural and must include any kind of interest, whether proprietary, pecuniary or otherwise, that a person may have, and if such an interest is affected by the sale he is entitled to apply (2).

Where an interim receiver makes an application under O. 21 r. 90, C. P. C. it cannot be considered to be an application under S. 47, C. P. C. as an interim receiver does not represent the judgment-debtor for the purpose of getting the property escape execution. No second appeal, therefore, lies from an order passed on such an application (3). It was also held there that it is a question of fact to be determined with reference to the nature of the objection raised by the Official Assignee as to whether he is a representative of the judgment debtor for the purposes of S. 47, C. P. C. or not.

Right to apply to an executing court under section 52.—It was held in A. I. R. 1926 Mad. 432 (4) that the receiver referred to in section 52, Provincial Insolvency Act is the receiver appointed after adjudication and that no application under that section on the part of an interim receiver would lie. That view was correct under the Act 3 of 1907, because under section 35 which corresponded to section 52 of the present Act, the executing court was to be given notice that an order of adjudication had been made against the petitioner. Under S. 52, P. I. A., 1920, notice is given to the executing court that an insolvency petition

(1) *R. Subranania Ayyar v. Dharapuram Janopakara Nidhi, Ltd.*, A. I. R. 1928 Mad. 454 : 109 I. C. 148.

(2) *Dhirendra Nath Roy v. Kamini Kumar Pal*, A. I. R. 1924 Cal. 786 : 51 Cal. 495 : 84 I. C. 119

(3) *Mohitosh Datta v. Rai Satish Chandra Choudhuri*, A. I. R. 1932 Cal. 208 : 136 I. C. 593.

(4) *Subramania Ayyar v. Official Receiver, Tanjore*, A. I. R. 1926 Mad. 432 : 93 I. C. 377.

by or against the debtor has been admitted. At the time of this amendment S. 20. the Legislature did not notice that the section, as amended, was out of place under the heading, "Effect of insolvency on antecedent transactions." This case was dissented from in a subsequent ruling of the same High Court reported in A. I. R. 1932 Mad. 95 (1). There it was held: "Section 52 as amended is peremptory in its terms and contemplates the presentation of an application not after adjudication but at an earlier stage, i.e., after an insolvency petition has been admitted. At that stage the only receiver that can be in existence for the purpose of applying is the interim receiver. The receiver referred to in section 52 is not the receiver appointed after adjudication and an application under section 52 by an interim receiver is competent."

Where, therefore, an interim receiver moves the court under section 52 to adjourn a sale in execution of a decree against the insolvent, the executing court must stay the sale and direct delivery of the property to the interim receiver and an Official Receiver subsequently appointed is justified in declining to recognize the title of the auction-purchaser under such a sale. That an interim receiver has a right to apply under section 56 was assumed in *Lachhi v. Badri Prashad* (2), though the case was decided against the interim receiver on the finding that the court could not remove the person in possession under the proviso to section 56 (3). The point was raised in a very indirect manner and left undecided in *Mohitosh Datta v. Rai Satish Chandra Choudhuri* (3), as in that case the interim receiver's application was made after and not before the sale by the executing court.

Right to apply under section 29, Provincial Insolvency Act, 1920.—Under section 29 a court is to stay the proceedings only on proof that an order of adjudication has been made. An interim receiver has therefore no *locus standi* for making an application under section 29.

An interim receiver is an officer of the court.—A receiver appointed under O. 40 r. 1, C. P. C. is an officer of the court. He is the representative of the court and of all parties interested in the litigation, wherein he is appointed (4). The legal consequences arising from this fact are that property in the hands of a receiver cannot be attached without first obtaining the leave of the court (5) and a receiver cannot sue or be sued except with the leave of the court by which he was appointed receiver (6). For fuller treatment refer to Mulla's Civil Procedure Code, pages 970 to 974, 9th edition.

The position of an interim receiver under section 20 and a receiver appointed after adjudication under section 56 compared. The interim receiver is appointed by the court before the order of adjudication, whereas the receiver under section 56 is appointed after adjudication and on his appointment the property of the insolvent, which had vested in the court under section 28 sub-section (2), vests in

(1) *Sivasami Odayar v. C. R. Subramania Aiyar*, A. I. R. 1932 Mad. 95 : 55 Mad. 316 : 136 I. C. 338.

(2) 36 P. L. J. 205 : A. I. R. 1934 Lah. 1003 : 156 I. C. 278. (Scope of the section and its relation to section 56 was considered).

(3) A. I. R. 1932 Cal. 203 : 136 I. C. 593.

(4) *Jagat Tarini Dasi v. Naba Gopal*, 1907, 34 Cal. 305, at page 316.

(5) *Kahn v. Ali Mahomed*, (1892) 16 Bom. 577.

(6) *Miller v. Rom. Ranjan*, (1884) 10 Cal. 1014; *Dunne v. Jumar Chandra*, (1903) 30 Cal. 593; *Fink v. Corporation of Calcutta*, (1903) 30 Cal. 721; *U. Gn Maung v. Ebrahim*, (1928) 6 Rang. 268 : 110 I. C. 622 : A. I. R. 1928 Rang. 622.

S. 20. such receiver. The interim receiver represents and can interfere with only that portion of the debtor's estate for which he has been expressly authorized by the court. The insolvent still remains the owner of the property and for all practical purposes he can act himself on behalf of his own property. Not so after adjudication. The whole of the property vests in the receiver and he alone represents the debtor's estate.

From this it would follow that proceedings against the debtor or the debtor's estate can be taken and proceeded with without the leave of the insolvency court and without making the interim receiver a party to the suit. Section 28 (7) does not affect the matter. Section 28 (7), Provincial Insolvency Act, 1920, must be read in conjunction with Sections 28 (2) and 29. No doubt, once the order of adjudication is made, the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition, or in other words, the commencement of the insolvency. For all purposes of the Insolvency Act, this fiction has to be used, and it is a very useful fiction; but outside those purposes it has no place; and the filing of a suit prior to the adjudication may be regarded outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2).

It is not therefore necessary to implead an interim receiver as a party to the suit filed before the order of adjudication, and where the Official Receiver is made a party to the suit after the order of adjudication his impleading is not governed by S. 22, P. I. A. (1).

The receiver appointed after adjudication does not stand in the shoes of the interim receiver; he stands on a much higher footing. The property of the judgment-debtor vests in him; he holds it for the benefit of the whole body of creditors and he has special rights conferred and special duties imposed upon him by statute. Amongst other rights conferred upon him is the right to make an application under S. 36, P. I. A. (1907) and this statutory right which has been conferred on him cannot be taken away by an order in a proceeding to which he was not a party.

Therefore an order as to the validity of a transaction obtained upon an application to which the debtor and creditors alone are impleaded as parties while the debtor's estate is in the custody of an interim receiver does not operate as *res judicata* as against the receiver appointed after the order of adjudication and does not debar him from making an application under S. 36, P. I. A. (1907) (2).

Appointment of receiver discretionary.—The section provides that on a creditor's petition the court may, and, on a debtor's petition ordinarily shall appoint an interim receiver of the property of the debtor or of any part thereof. In both the cases it is within the discretion of the court; only that on a debtor's petition the appointment of a receiver shall be the rule and on a creditor's petition it shall be done only if sufficient grounds exist. It is a judicial discretion to be exercised according to judicial principles, and for those principles the insolvency court may seek guidance from the provisions of Order 40, Civil Procedure Code. Where in a pending insolvency application the lower court found that the alleged insolvent had heavy debts to pay, that some of his cheques were returned and his accounts were not forth-

(1) T. K. Kaliaperumal Naicker v. O. S. Ramchandra Ayyar, A. I. R. 1927 Madras 693; 103 I. C. 444; 53 M. L. J. 142.

(2) Ram Saran Mandar v. Shiva Prasad, A. I. R. 1920 Patna 286; 58 I. C. 783.

coming and after considering the circumstances it appointed an interim receiver in the exercise of the discretion vested under section 20 and this order was confirmed by the District Court, it was held that there was no question of jurisdiction and that there was no ground for interference by the High Court in second appeal (1). The appellate court also has the power to appoint an interim receiver pending an appeal by the debtor from an order refusing adjudication (2).

S. 21.

21. At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may either of its own motion or on the application of any creditor make one or more of the following orders, namely :—

Interim proceedings
against debtor.

(1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that, in default of giving such security, he shall be detained in the civil prison ;

(2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;

(3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary :

Provided that an order under clause (2) or clause (3) shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court,—

- (i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or
- (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any

(1) *Veni Lal v. Vir Chand*, 139 I. C. 44 : A. J. R. 1932 Bom. 228.

(2) *Abdul Razak v. Basiruddin Ahmed*, (1910) 14 C. W. N. 586 ; 6 I. C. 95.

S. 21
(1).

documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

History.—This is section 13 of the Act 3 of 1907 except clause 2 which has been omitted from the present section and a new section, section 20, has taken its place in the new Act. Under the old Act the insolvent, if imprisoned for debt, was released as soon as an order of adjudication was passed by the court under S 16, P. I. A., 1907. Till the passing of the order of adjudication the insolvency court could not under the old Act release the judgment debtor *cum* the insolvent from jail (1). Under the Insolvency Chapter of the Code of Civil Procedure, 1882, it was provided by section 349 that where the judgment-debtor, who had filed an insolvency petition under section 344, was under arrest, the court might, pending the hearing under section 350, order him to be immediately committed to jail or leave him in the custody of the officer to whom the service of the warrant was entrusted, or release him on his furnishing sufficient security that he would appear when called upon. The word "arrest" in section 349 was interpreted as not to include "imprisonment". It was therefore held that the power conferred on the court under that section to release a judgment-debtor arrested in execution of a decree on security being given by him, ceased after he had been imprisoned or put into jail (2).

The Act 3 of 1907 had two defects. Firstly a deserving debtor, even though he had sought the help of the insolvency court by filing an insolvency petition, had to suffer the hardships of the jail till the order of adjudication. Secondly, under section 16 (1) (b) every debtor, whether honest or dishonest, got an automatic release from prison on the making of an order of adjudication. These defects have been removed by the enactment of section 23, which provides for the release of the debtor from jail before the order of adjudication, and section 31, which has made the release of the insolvent from arrest or detention after an order of adjudication, discretionary with the insolvency court.

Object.—The object of section 21, like sections 20 and 22 is to make the insolvency proceedings effective by the preservation of the debtor's estate and by securing the help of the debtor which he is bound to render on pain of suffering other penalties. The power to demand reasonable security from the debtor for his appearance in insolvency proceedings enables the court to make enquiries about his state of affairs and other matters connected with insolvency. With its power of attachment by actual seizure of the debtor's property, the court can prevent the debtor from making away with any of his property which in the event of an order of adjudication being passed against him, might be made available for distribution amongst the creditors. The power to issue a warrant of arrest can be exercised to secure the presence of the debtor within the local limits of the jurisdiction of the court. All these powers are necessary in the interest of the general body of creditors.

Clause 1.—The order to give reasonable security for the appearance of the debtor can be passed whenever the court requires the personal

(1) *E. D. Sasoon and Company v. Kishan Chand*, 30 P. L. R. 1910 : 8 I. C. 1104; *In re Hajumar*, 7 I. C. 606 (1).

(2) *In re Quarme*, 8 Mad. 503; *Mahomed Hussain v. Radhi*, 12 Bom 46; *Muhammad v. Lakhan*, 1910 F. R. 25; 1910 P. L. R. 30.

attendance of the debtor (1). It is for the judge to determine whether the security is sufficient (2). The general principles applicable to sureties under the Civil Procedure Code shall apply to cases arising under this clause. Under the old Code of Civil Procedure it was held in a case under section 336 of that Code that a security bond, unless its stipulations fell within section 336, could be enforced only by a separate suit (3). Under the present Code the liability of a surety can be enforced in execution proceedings under S. 145, C. P. C. and a separate suit, though not barred, has become unnecessary. The bond is in favour of the court and it is to be enforced by the court. If on account of the default of the surety the bond is forfeited, it would appear that the money so obtained will not be given to the petitioning creditor but will be kept for distribution amongst all the creditors in insolvency. Under the old Code of Civil Procedure it was held that a bond given to a district judge under section 349 could be assigned and the assignee of a security bond was entitled to maintain an action on that bond (4). The ruling, it is submitted, will hold good even now under the Civil Procedure Code, 1908, and the Provincial Insolvency Act, 1920.

S. 21
(3).

Clause 2.—The procedure for attachment to be adopted by the insolvency court should be the same as that provided for in Order 21, C. P. C. by virtue of S. 5, P. I. A., 1920. An attachment under the clause is strictly analogous to an attachment before judgment effected under O. 38, rr. 5 to 12, C. P. C. (5). If objections by third persons are filed to an attachment under the clause the court is bound to enquire into the claim (6). It may be noted that the court cannot attach property which is not liable to attachment and sale in execution of a decree.

Clause (3).—It is provided that the court may order a warrant to issue for the arrest of the debtor and can, when the debtor is brought before it, commit him to the civil prison or release him on taking security.

Proviso.—The power conferred on the court to order attachment or arrest under clauses 2 and 3 are not to be exercised unless the conditions laid down in the proviso are fulfilled to the satisfaction of the court. When notice is issued to the debtor under section 19 sub-section 3 and he fails to appear, even after due service, the court may not wait for him and adjourn the proceedings under section 24. It may proceed with the application on the date fixed and if other conditions are satisfied may adjudge him an insolvent. But the court is not justified in such circumstances in issuing a warrant for the arrest of the debtor—an order which can only be passed under clause (3) of section 21 (7).

An order of attachment by actual seizure is also to be made only when the court is satisfied that the debtor, with intent to defeat or

(1) *E. D. Sasoon v. Kishen Chand*, 30 P. L. R. 1910.

(2) *In the matter of Bhuban Mohan Bose*, 15 W. R. 571.

(3) *Jankidas v. Ram Partap*, 16 All. 37; (1894) I. L. R. 19 Bom. 694; (1910) 12 Cal. L. J. 419.

(4) *Gopi Nath Chaudhari v. Benode Lal Ro Chowdhari*, 31 Cal. 162.

(5) *Hashmat Bibi v. Bhagwan Das*, A. I. R. 1914 All. 264; 36 All. 65; 24 I. C. 752; also see *Manak Chand v. Ibrahim*, A. I. R. 1921 Nag. 25; 62 I. C. 307. In this Nagpur case, O. 21, r. 71, C. P. C., was applied to make a defaulting purchaser to pay deficit arising out of re-sale.

(6) *Hashmat Bibi v. Bhagwan Das*, *Supra*.

(7) *Amar Singh Rajinder Singh v. Imperial Bank of India, Jullundur*, A. I. R. 1929 Lah. 808; 1929 T. C. 376.

S. 22. delay his creditors is about to remove from the limits of the jurisdiction of the court any documents or any part of his property. The summary powers conferred by section 21 are intended to prevent the debtor from making away with what is his property-documents and books of account which might be used against him and property which he might run away with and take away out of the reach of the creditors. It is an abuse of the section to order the attachment of a house claimed by the wife of the insolvent as her property and admitted by the insolvent as her's at the instance of a creditor alleging that the wife was only a benamidar for the insolvent (1).

Powers discretionary.—The powers under Ss. 21 and 22 are entirely in the discretion of the court and the High Court should not in second appeal interfere with that discretion (2).

Miscellaneous.—Where money is deposited in the court by the debtor during the pendency of insolvency proceedings against him in pursuance of a private understanding between the debtor and the petitioning creditor, it ought to be kept in court and the petitioning creditor should not be allowed to withdraw it during the continuance of the insolvency proceedings. Holding otherwise will be to go against the wholesome practice that a creditor should never be allowed to withdraw his application on the ground that his debts have been satisfied (3).

22. The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them, respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver, or as may be prescribed.

History.—Section 22 is based on s. 43 sub-section (1) of the Act 3 of 1907. Section 43 sub-section (1) ran as follows : “(1) Every debtor, whether before or after the making of an order of adjudication, shall produce all books of account, give such inventories of his property, and such lists of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally give such aid in the realisation of his property and the distribution of the proceeds amongst his creditors, as may be required by the Court or receiver, or as may be prescribed.”

The sub-section has been split up into section 22 and section 28 clause (1) under the Act. The duties imposed on the debtor as soon as the court has made an order admitting the petition are now provided in the present section. As regards obligations for aiding to the utmost of his power in the realisation of his property and the dis-

(1) *Mrinalal Dassi v. Harihar De*, 59 Cal. 1338; 142 I. C. 72; A. I. R. 1933 C. 76.

(2) *Darrah v. Fazal Ahmad*, 39 I. C. 903; A. I. R. 1926 Lah. 860.

(3) *Ko Maung Gyi v. P. L. M. Chettyar Firm*, A. I. R. 1929 Rang. 338.

tribution of the proceeds among his creditors provision has now been made in section 28 (1) because these obligations do not arise before the debtor is adjudged insolvent. In section 43 (1) these duties were mixed up and the distinction between duties which arise before adjudication and those which arise on adjudication was not maintained. The arrangement under the present Act has made the matter precise and clear. S. 22.

Section 43 sub-section 2 of the old Act has been replaced by section 69 of the present Act. The wording of sub section (2) of section 43 was unduly vague, regard being had to the fact that it defined a criminal offence and difficulties had been experienced. Moreover, there were no provisions regarding the procedure to be adopted by the court which desired to take action (1). The law has now been brought in line with that provided in S. 33, Cs (1) and (2), Pt. I. A., 1909, S. 24, B. A., 1883 and S. 22, B. A., 1914.

Scope.—Section 22 deals with the duties of the debtor on admission of his petition and before the order of adjudication. The section has two parts. The first part requires the debtor to produce all books of account on the making of an order admitting the petition. It can apply only when the debtor is the petitioner. A creditor's petition is admitted without notice to and in the absence of the debtor. The second part applies to a creditor's petition as well and to all stages of the proceedings following the admission of the petition, even after the order of adjudication. The second part covers the requisition to produce account books (2).

Under the first part the insolvent is bound to produce the account books. The court should not be satisfied with the statement of the debtor which merely verifies statements in the petition and denies keeping of account books. The truth or otherwise of the debtor's statement that he does not keep account books is to be found out. It is the duty of the court to be satisfied that the debtor's statement denying the keeping of account books is correct (3).

Proper time for the exercise of court's powers.—It was remarked in A. I. R. 1926 Lah. 360, (4) that under section 22 the court may at any time after admitting the petition demand an inventory of the debtor's property and lists of his creditors and debtors and of the debts due to and from him. Rule 5 of the Bombay High Court provides that the court may at the time of issuing a notice under section 19 sub-section 3 also require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e). Some of these particulars are covered by section 22 as well. Under section 13 a creditor's petition need not contain the names and residences of the other creditors of the debtor. At the same time it seems desirable that when the petition comes for hearing before the court the other creditors should also be present to put their case. The reason stated above appears to have led to the enactment of rule 5 of the Bombay High Court. Still it has been held by the Lahore High Court in *Ganesh Das v. Khilanda Ram*, (5) that ordinarily the court should call upon the petitioning creditor to establish his right to present such petition before

(1) Statement of Objects and Reasons.

(2) *Akhay Chand Begwani v. The Emperor*, 61 Cal. 537 : A. I. R. 1934 Cal. 409 : 149 I. C. 352.

(3) *Ganesh Lal Sarowgi v. Sanchi Ram* A. I. R. 1933 Patna 43 : 12 Pat. 107 : 141 I. C. 223.

(4) *S. R. Darrah v. Fazal Ahmad*, A. I. R. 1926 Lah. 360 : 93 I. C. 903.

(5) *A. I. R. 1929 Lah. 636 : 119 I. C. 753.*

- S. 23.** taking any other action against the debtor except under circumstances justifying the court to order otherwise. If this rule should be followed as a matter of practice it will mean that at the first hearing on a creditor's petition the court should proceed to determine the petitioner's right to present the petition as between the petitioning creditor and the debtor and only if that right is established the court should enquire of the debtor the names and residences of his other creditors and then, having obtained that information, it should issue notice to them. It is doubtful whether this practice will be consistent with the procedure provided in section 19 in regard to issue of notices.

Consequences of refusal or neglect to comply with section 22.—

As a consequence of the debtor's failure to discharge his duties under the section, the petition for insolvency is not liable to be dismissed. The court cannot refuse to pass an order of adjudication (1). There it was remarked that though S. 14 (2), P. I A., 1907, requires that the court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing; but it does not follow that every matter which forms the examination of the debtor should be decided before an order of adjudication is made. It was further remarked that the scheme of the Act 3 of 1907 is to make an order of adjudication first and then to make a full enquiry into all matters connected with the insolvency before the final discharge is decided.

Wilful failure to perform the duties imposed on the debtor by section 22 is an offence under section 69 (a) punishable on conviction with imprisonment which may extend to one year. The insolvency court has jurisdiction to issue such processes as prohibition and injunction to prevent alienation of his property by the debtor. But where the processes are full of defects and do not purport to give the notice to the debtor of admission of an insolvency petition at all, the debtor on whom they are served is not legally liable to comply with them and cannot be convicted under section 69 (a) on his failure to comply with them (2). Nor the power of issuing injunction should be used to defeat the other provisions of the Act. Thus although the receiver can claim a provident fund deposit after it has been paid to the insolvent, the court should not issue such a direction to the insolvent, as the effect of such an order would be to destroy the beneficent provisions of the Provident Fund Act (3).

- 23.** (1) At the time of making an order admitting the petition or at any subsequent time
Release of debtor. before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

(2) The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released.

(1) *Bava Jeer Chetty v. Bava Rangaswami Chetty*, 12 I. C. 618.

(2) *S. A. Santiago v. Emperor*, A. I. R. 1936 Nag. 237.

(3) *Official Assignee Madras v. R. W. Manifold*, A. I. R. 1936 Mad. 854.

(3) At the time of making any order under this section, the Court shall record in writing its reasons therefor. **S. 23.**

History.—Section 13 of the Insolvency Act, (11 and 12 Vict., Chap. 21) which dealt with the grant of ad interim protection ran as follows :—

"And be it enacted that in any case when a petition shall have been presented by an insolvent debtor as aforesaid, or an act of insolvency shall have been adjudged to have been committed as aforesaid, it shall be lawful for the said court, after the filing of the schedule required by this Act, if under the circumstances it shall appear proper, to make an interim order for the protection of the insolvent from arrest, and any such interim order may apply either to all the debts or liabilities mentioned in the schedule, or to any of them, as the court may think proper, and may commence and take effect at such times as the court shall direct ; and any such order may be recalled and may be renewed as it may appear proper to the court ; and any such order when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the towns of Calcutta, Madras and Bombay, respectively, or any other place within the territories under the Government of the East India Company ; and any person arrested or detained, contrary to the tenor and effect of any such order, shall be entitled to his discharge out of custody upon application to any court or judge which or who shall have power to set at large any person illegally detained in custody under the process, by virtue of which, such person shall have been arrested or so detained :

Provided always, that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent, whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled or shall fall by reason of the petition of the insolvent being dismissed or the adjudication being reversed (1)."

Under the Insolvent Act an insolvent debtor after his petition had been admitted was required to file a schedule of his debts and liabilities. After the filing of the schedule he could apply for an interim order protecting him from being arrested, detained or imprisoned for any debt or liability to which the order so obtained applied. And the court's jurisdiction in granting protection extended to all debts or liabilities mentioned in the schedule.

Act 3 of 1907 did not provide for the granting of any interim protection to the debtor from arrest or imprisonment before the order of adjudication, irrespective of the fact that the debtor was or was not actually at the time under arrest or imprisonment (2). Under section 16 sub-section (1) clause (b) the order of adjudication had the effect of automatically releasing the insolvent, if imprisoned for debt, and during the pendency of the insolvency proceedings no creditor had any remedy against the property or person of the insolvent in respect of the debt due to him except with the leave of the court. The result was that a dishonest debtor who did not want to pay his debts had only to apply for his

(1) Quoted in *In the matter of Tokee Bibee v. Abdul Khan*, 5 Cal. 536.

(2) *In re Haji Umar*, 4 S. L. R. 47 : 7 I. C. 606.

(3) *In re Haji Umar*, 4 S. L. R. 47 : 7 I. C. 606.

- S. 23.** adjudication ; for if in jail he got his release forthwith under the Act, and was practically protected from being sent to jail again. These defects were removed in the present Act.

In section 28 the creditor has not been debarred, as he was under the old Act, from proceeding against the person of the insolvent. Section 16 sub-section 1, clause (b), P. I. A., 1907 was repealed and two new sections, the section under consideration and section 31, were enacted. By the section under consideration provision was made for the grant of protection to the debtor before adjudication and by section 31 protection to the debtor has been assured after an order of adjudication. The language of the two sections is very different in material particulars and we shall refer to it below.

English law different.—Under the English law it is provided by S. 7, B. A., 1914, that on the making of a receiving order no creditor to whom the debtor may be indebted in respect of any debt proveable in bankruptcy will have any remedy against the property or person of the debtor in respect of the debt. Under the Indian Law proceedings by a creditor against the person of the debtor in respect of a debt are not affected by an order of adjudication unless a protection order has been passed by the insolvency court in accordance with the provisions of S. 23 or S. 31, P. I. A., 1920.

Applicability.—The wording of the section is quite general and the section applies whether the petition is presented by a debtor or a creditor. The learned commentator, A. Ghosh, has given his opinion that no application by the debtor under section 23 lies where the petition for insolvency is presented by a creditor. It is submitted that this opinion is not correct. That the section applies on a creditor's petition also was assumed in *Tara Chand v. Jawahar Mul* (1), under the following circumstances, namely :

On the application of a creditor of a judgment-debtor to have the judgment-debtor adjudicated insolvent, an *ad-interim* receiver was appointed and he was placed in possession of all the moveable and immoveable property of the judgment debtor. Thereafter another creditor who had obtained a decree against the judgment-debtor applied for his arrest. The judgment-debtor thereupon put in an application alleging that he was unable to pay the decretal amount as all his property was in the hands of the receiver. The executing court rejected his application, arrested him and sent him to jail, on the ground that it was possible for the judgment-debtor to obtain protection order from the insolvency court. It was then held that the debtor could not be given a protection order under section 23 or section 31 and that the executing court ought to have given him the benefit of O 21 r. 40 so long as the property was in the hands of the receiver and should not have arrested him and sent him to jail. The above case illustrates that there may be circumstances where necessity for a protection order to the debtor may arise in insolvency proceedings initiated by a creditor's petition.

Conditions of applicability of the section.—In order that an order of release may be granted under the section, two conditions must be satisfied :—

(a) that at the time of the application under the section the debtor is under arrest or imprisonment ; and

(1) A. I. R. 1931 Lah. 121 : 131 I. C. 208.

(b) that he is under arrest in execution of the decree of any court for the payment of money. **S. 23**

The effect of the first condition is that the section will apply only if the debtor is actually under arrest or imprisonment. It will not apply where he is only liable to be arrested but is not in fact arrested or imprisoned; and no order under the section can be passed protecting the debtor from arrest or imprisonment in anticipation of such arrest or imprisonment. As to whether the court has inherent jurisdiction to grant protection in anticipation of arrest or imprisonment during insolvency proceedings before the order of adjudication, *apart from section 23*, has been considered in many decided cases which have been separately noticed under another heading under the section.

In execution of the decree of any court for the payment of money.—In order that the section may be invoked for the help of the debtor it is necessary for him to prove that he has been arrested in execution of the decree of any court for the payment of money. Accordingly it has been held that the proceedings of the Collector in recovering loans under section 7 (1) (a), Land Revenue Act, “as if they were arrears of land revenue” are neither a “suit” nor the execution of the decree of any court; since the revenue officer is not a “Court” and an arrear of land revenue are not the amount of a “decree,” it follows that a debtor who is under arrest or imprisonment by reason of the order of a revenue officer made under the provisions of section 45, Land Revenue Act, is not “under arrest or imprisonment in execution of the decree of any Court” and that the provisions of section 23 (1), Insolvency Act, have no application to the case of such a debtor (1). Where a person is arrested under the orders of the Manager, Encumbered Estates, under the provisions of section 10 of the Sind Encumbered Estates Act read with section 157 of the Bombay Land Revenue Code, the insolvency court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any court for payment of money (2).

Arrest under section 488 sub-section 3, Cr. P. C. 1898.—

It was decided in a very old case, *Tokee Bibbe v. Abdull Khan* (3) that an order of maintenance is a debt which a debtor can show in his schedule required to be filed under the Indian Insolvent Act, and as such the insolvency court could grant a protection order in respect of arrears of maintenance. The present Act is quite different from the Indian Insolvent Act. Under the English law (4), a claim for maintenance ordered to a wife by a decree of the court is not a debt proveable in insolvency. It appears that the same rule will apply under the Indian Act (5). Under section 23 a person arrested under section 488, Cr. P. C., 1898, can be released only if an order of maintenance is a “decree.” The point has not been decided in any Indian ruling but it was doubted whether a person so arrested is under arrest or imprisonment in execution of a decree of any court.

(1) *Collector of Akyab v. Paw Tun U*, A. I. R. 1928 Rang. 81 : 5 Rang. 806 : 109 I. C. 145.

(2) *Ghansham Dass Khatumal v. Manager, Encumbered Estates*, 99 I. C. 930 : A. I. R. 1927 Sind 123.

(3) 1880, 5 Cal. 536.

(4) *Linton v. Linton*, 1885, 15 Q. B. D. 239.

(5) *Paman Mal Heman Mal*, in the matter of, A. I. R. 1916 Sind 53 (1) 53 I. C. 541.

S. 23.

In some cases, while considering the applicability of the section it was considered as to whether a particular debt is proveable in insolvency or not. It is submitted that that point is only relevant under section 31 and not under the present section. Here we are concerned only with the fact that the debtor should be under arrest in execution of the decree of a court for the payment of the money. It will be still more clear if it is remembered that under the section the court can release the debtor only so far as the execution proceedings of the decree in which he was arrested are concerned. A debtor released under the section is liable to be arrested in execution of another decree.

The court may order release—The provision under section 23 is a temporary procedure. The section is not mandatory and the court can refuse to release the petitioner but in all cases the court shall record in writing its reasons therefor (1)

Inherent jurisdiction to grant protection in anticipation of arrest—We have seen that the section applies only after the debtor has been arrested or imprisoned. The question we have to consider is : Has the insolvency court inherent power, apart from section 23, to grant protection to a debtor who has not been arrested or imprisoned against such arrest or imprisonment in anticipation, pending insolvency proceedings and before the passing of an order of adjudication ?

Under the Act 3 of 1907 it was held that the court, whether it is a trial court or it is an appellate court, has inherent power to make the order under S. 151, C. P. C., read with S. 47, P. I. A., 1907 (3). In the old Act there was no provision similar to the present section. On adjudication a debtor automatically got immunity from arrest. There was, however, section 47 applying the Civil Procedure Code to insolvency courts. In the absence of any express provision, it could be said that the inherent jurisdiction of the civil court under S. 151, C. P. C., could be used for the ends of justice. There were, therefore, good grounds for holding the view that the court could grant an interim protection.

In the new Act, section 23 and section 31 were newly added and the question as to the extent to which protection should be granted to a debtor during the pendency of insolvency proceedings was before the legislature in a direct and conspicuous manner. Sections 23 and 31 were enacted at the same time and the deliberate difference in the scope of the two sections introduced by the Legislature clearly implies that it intended these two sections to be the only sections under which the protection was to be granted. A closer examination of the language of sections 31 and 23 will show the following differences in their scope :—

(a) The marginal note to section 31 is "protection order." The word "protection" implies that you have to protect a person against something which is to come in future. The word protection is used in the sense of prevention. The marginal note to section 23 is "release of debtor." There can be release only when somebody is under arrest or imprisonment. You cannot release a person who has not been arrested.

(b) The words "make an order for the protection of the insolvent from arrest or detention" in section 31 present a striking contrast to the

(1) *Nand Lal v. Nath Mull Srinivas*, A. I. R. 1924 Patna 559; 4 Pat. 604; 88 I. C. 687.

(2) *Abdul Razak v. Basiruddin Ahmed*, (1910) 6 I. C. 95.

words "order his release, if the debtor is under arrest or imprisonment," S. 23, used in section 23. Under section 31 it is anticipated that the insolvent might be arrested or detained. Section 23 deals with a situation which actually arises after the arrest or imprisonment of the debtor.

(c) The protection order under section 31 applies to all the debts of the debtor or to any of them and grants him immunity from arrest for any debt to which the order applies. Section 23 contemplates the execution of *one* decree and the order of release affects the debtor's liability to the extent of that decree only.

(d) Under section 31 the order, in case it is revoked or the adjudication annulled, does not operate to prejudice the rights of any creditor to proceed against the person of the debtor. Under section 23 the court restores the status quo by re-arresting and re-committing the debtor to the custody from which he was released. Sub-section 2 clearly indicates that the legislature deliberately confined section 23 to cases where the debtor is actually under arrest or imprisonment.

The object of comparing and contrasting the two sections is to bring home and make clear the fact that the legislature was considering at one and the same time the question of protection and its extent to be granted to the debtors before and after the order of adjudication. Had the legislature intended to give protection to the debtor in anticipation of arrest even before the order of adjudication, it was but natural that they should have either amalgamated the two sections or they would have so worded section 23 as to extend its scope and to include the passing of protection order in anticipation of arrest even before an order of adjudication. Section 5 is to be applied subject to the other provisions of the Act and it was the clear intention of the legislature that section 23 and 31 were exhaustive on the subject and that in no other case, apart from these sections, protection was to be granted. S. 151, C. P. C. cannot and should not be used to over-ride the clear intention of the legislature.

Except for one case (1), which followed *Abdul Razak v. Basiruddin Ahmed* (2), it is gratifying to note that all the High Courts have taken the view that the court has no inherent jurisdiction to grant *ad interim* protection to a debtor in anticipation of arrest or imprisonment (3).

Miscellaneous—A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is not liable to arrest in execution of a decree in accordance with the provisions of the Act of 1920 even if he does not take out a protection order (4).

The fact that the husband has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that he is unable to pay his debts. He, being unable to pay his debts, is not guilty of wilful neglect within the meaning of section 488, Cr. P. C. (5).

(1) *Nallagatti Goundan v. Ramana Goundan*, 85 I.C. 677 : A.I.R. 1925 Mad. 170.

(2) 6 I. C. 95: 1910, 14 C. W. N. 586

(3) *Mariambibi v. Motala*, A. I. R. 1932 Rang. 51: 10 Rang. 71: 137 I C. 36; *Sinnaswamy Chettiar v. Aligi Gundan*, 80 I. C 938: A. I. R. 1924 Mad. 893 (1); *Tara Chand v. Jawahar Mal*, 131 I. C. 208: A. I. R. 1931 Lah. 121; *Jewraj Kharewalla v. Lal Bhai Kalyan Bhai*, A. I. R. 1926 Cal. 1011: 96 I C. 181 (Opinions were expressed but the point was left undecided); *Ghulam Sarwar v. Gurupraia*, 148 I. C. 975: A. I. R. 1934 Lahore 113 (2); *Paran Chandra Sen v. Blackwood and Blackwood Co*, 36 C. W. N. 345

(4) *Radhey Shiam v. Hakim Saiyed Mohammad Taqi alias Mijjan Sahib*, A.I.R. 1928 Oudh 36 c): 72 I. C. 911.

(5) *Halfhide (Mr.) v. Halfhide (Mrs.)*, A. I. R. 1924 Cal. 30: 81 I C. 912: 50 Cal. 867.

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(2), 24. **Sub-section 2.**—Under S. 341, C. P. C., 1882, (corresponding to section 58 of the present Civil Procedure Code) it was held that where a judgment debtor has been released from prison by an order of the insolvency court, the civil court could not order the arrest of such judgment-debtor for a second time under the same decree, even though the insolvency court's order had ceased to operate as a bar to such arrest (1). Under the present Civil Procedure Code section 58 enumerates the circumstances in which the judgment-debtor may be released from prison before the expiry of six months or six weeks, as the case may be ; and a judgment-debtor so released is not liable to be re-arrested under the decree and execution of which he was detained in the civil prison. The Civil Procedure Code does not provide for cases where the judgment-debtor is released by an order of the insolvency court. It appears that, even if the insolvency court does not re-arrest or re-commit the debtor to the custody from which he was released, the executing court has authority to order the re-arrest of the person in execution of the same decree as soon as the insolvency court's order becomes inoperative by revocation or otherwise. However that may be, sub-section 2 of the present section authorizes the insolvency court to re-commit the debtor released by it to the same custody. And in all cases it is desirable that when the court revokes its order it should make an order under sub-section (2).

24. (1) On the day fixed for the hearing of the petition, or any subsequent day to which the hearing may be adjourned, Procedure at hearing. the Court shall require proof of the following matters, namely :—

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition :

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon ;

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition ; and

(c) that the debtor has committed the act of insolvency alleged against him.

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing,

(1) In the matter of Boyle Chund Dutt, 20 Cal. 874.

(2) Sellaya Mal v. Perianna Pillai, 1934 M. W. N. 1140.

and the creditors shall have the right to question the debtor thereon. S. 24.

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the Judge, and shall form part of the record of the case.

History.—This is section 14 of the Act 3 of 1907, except for the proviso to sub-section 1 (a), which has been newly added. The conditions on which the debtor may present a petition for insolvency are laid down in section 10, which corresponds to section 6 of the Act 3 of 1907. Under the old Act inability to pay his debts was not a necessary condition to be proved by the debtor before he was entitled to present an insolvency petition. All that he was required to do was to make in his petition a statement that he was unable to pay his debts. There was a difference of opinion as to the legal effect of that statement in the petition. One view was that by making it a part of the petition, the legislature intended it to be a condition of the debtor's petition. The other view was that it was not so. We have noticed this conflict under sections 10 and 13. In the present Act, the legislature amended the law by adding the words "unless he is unable to pay his debts" in section 10 so as to make it necessary for the debtor to prove that he is unable to pay his debts before he can be adjudged insolvent. At the same time it was thought that at the initial stage it was not possible for the court to go into the affairs and conduct of the insolvent in detail for the purpose of deciding as to whether he was really able to pay his debts or not. For this purpose the legislature, though making inability to pay debts a necessary condition on which a debtor may petition, enacted the proviso to sub-section 1 (a) of the present section. The result of the proviso, as we shall see later, is to make the inquiry into the debtor's affairs at the hearing of the debtor's petition a very summary one.

Analogous Law.—Unlike the present section, the Presidency-towns Insolvency Act and the Bankruptcy Act, 1914, deal separately with proceedings on a creditor's and debtor's petition. S. 13 (1), P-t. I. A., lays down the procedure to be followed on a creditor's petition and the order to be passed thereon. Section 15 deals with a debtor's petition. Section 14 lays down the conditions on which a debtor may petition. S. 13, P-t. I. A., which is based on section 7, B. A. of 1883 and corresponds to section 5, B. A. of 1914 may be quoted here with advantage. It runs as follows :—

"(i) A creditor's petition shall be verified by an affidavit of the creditor or of some person on his behalf having knowledge of the facts.

(ii) At the hearing the Court shall require proof of—

(a) the debt of the petitioning creditor, and

(b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency,

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(iii) The Court may adjourn the petition and order service thereof on the debtor.

(iv) The Court shall dismiss the petition—

(a) If it is not satisfied with the proof of the facts referred to in the sub-section (2), or

(b) If the debtor appears and satisfies the Court that he is able to pay his debts or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made.

(v) The Court may make an order of adjudication if it is satisfied with the proof above referred to, or if on a hearing adjourned under sub-section 3, the debtor does not appear and service of the petition on him is proved, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

(vi) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against the debtor, in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(vii) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make an order of adjudication on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition on which proceedings have been stayed as aforesaid.

(viii) The creditor's petition shall not, after presentation, be withdrawn without leave of the Court."

Section 15 stands as follows—

"(i) A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may thereupon make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

(ii) A debtor's petition shall not, after presentation, be withdrawn without the leave of the Court.

On the making of the order admitting his petition, a debtor shall—

(a) unless the Court otherwise directs, produce all his books of account, and

(b) file such lists of creditors and debtors and afford such assistance to the Court as may be prescribed, failing which the Court may dismiss his petition."

S. 5. B. A. of 1914, is almost the same as S. 13, P-t. I. A. and need not be quoted here. S. 6, B. A. of 1914, which deals with the debtor's petition, is as follows :—

"A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts and the Court shall thereupon make a receiving order.

(ii) A debtor's petition shall not, after presentment, be withdrawn without the leave of the Court." S. 24.

It will be convenient to consider section 25 and compare it with the corresponding provisions of the other Acts. The interdependence of sections 24 and 25 is obvious, that is why in the Presidency-towns and the English Acts, their subject matter is dealt with at one place. The court shall require proof at the hearing of only those matters which are necessary for deciding as to the petition should be granted or dismissed. And the extent of proof so required shall also depend as to how far it is necessary for the court to arrive at a finding for the purpose of accepting or dismissing the petition. Section 25 (1) lays down the circumstances in which the court is bound to dismiss the petition of the creditor. It does not say that the court is bound to grant the petition if those circumstances do not exist. The corresponding sections of the Presidency-towns Insolvency Act and the British Act provide for the making of an order of adjudication but not in a negative manner by prescribing only when the petition is to be dismissed. Again, under the Presidency-towns Insolvency Act, the word used is "may" and not "shall", just as it is in the present Act. The difference in the wording gives a wider discretion to the Presidency-towns Insolvency Courts in the matter of granting or dismissing insolvency petitions than the provincial courts have. As far as a debtor's petition is concerned, the Bankruptcy Act of 1914 provides that on a debtor's petition, the court shall make a receiving order. Comparing the three Acts we may state that in the case of a debtor's petition the making of a receiving order without any inquiry is the general rule, that under the Presidency-towns Insolvency Act the making of an order of adjudication on a debtor's petition is in the discretion of the court, and that it may be refused on any sufficient grounds, and lastly that under the Provincial Insolvency Act the court is bound to grant the petition unless the conditions laid down in section 10 are not found to have been satisfied. In actual practice however the working of the three Acts has been that an order of adjudication (a receiving order in England) is the general rule on a debtor's petition.

Notwithstanding the somewhat imperative wording of S. 6, B. Act 1914, it has always been held in England that an insolvency petition can always be dismissed on the ground of an abuse of process of court or where its only object is a collateral or inequitable purpose. The same has been held under the Presidency-towns Insolvency Act because of the discretion which section 15 gives to the court. Under the Provincial Insolvency Act the powers of the court are however much more limited. The provincial court is bound to grant the debtor's petition if the conditions laid down in section 10 are satisfied and cannot dismiss it on any other ground as an abuse of process of court or the like. As regards the creditor's petition, the law may be taken to be exactly the same under the three Acts, because the use of the expression "for any other sufficient cause" in section 25 sub-section (1) leaves a wide discretion to the court.

Another point of difference between the Provincial Insolvency Act on the one hand, and the Presidency-towns Insolvency Act on the other, is that in the latter Act express provision is made for establishing the existence of a petitioning creditor's debt in a separate action. Under the Provincial Insolvency Act, there is a difference of opinion as to whether the insolvency court can refuse to decide the existence or

S 24 validity of the petitioning creditor's debt and can stay proceedings for
(2). a separate trial in the ordinary courts.

Public examination of the debtor.—The provision in regard to the public examination of the debtor is contained in sub-section 2 of the present section. The corresponding provisions, S. 27, P-t. I. A. and S. 15, B. A. of 1914, are much more comprehensive. Under those Acts the public examination is to take place only after a receiving order or an order of adjudication is made and not before that. Again, under those Acts the insolvency court is to examine the insolvent whether he is present or not at the first hearing. It can summon him for the purpose. Under the Provincial Insolvency Act the Court is bound to examine the debtor only if he is present in court and not in all cases. Section 27 is as follows :—

(i) Where the Court makes an order of adjudication, it shall hold a public sitting on a date appointed by the Court of which notice shall be given to creditors in the prescribed manner, for the examination of the insolvent, and the insolvent shall attend thereat and shall be examined as to his conduct, dealings and property.

(ii) The examination shall be held as soon as conveniently may be after expiration of the time for the filing of the insolvent's schedule.

(iii) Any creditor who has tendered a proof or a legal practitioner on his behalf may question the insolvent concerning his affairs and the causes of his failure.

(iv) The official assignee shall take part in the examination of the insolvent; and for the purpose thereof, subject to such directions, as the Court may give, may be represented by a legal practitioner.

(v) The Court may put such questions to the insolvent as it may think expedient.

(vi). The insolvent shall be examined on oath, and it shall be his duty to answer all questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be read over either to or by the insolvent and signed by him, and may thereafter be used in evidence against him and shall be open to the inspection of any creditor at all reasonable times.

(vii) Where the Court is of opinion that the affairs of the insolvent have been sufficiently investigated, it shall by order declare that his examination is concluded, but such order shall not preclude the Court from directing further examination of the insolvent whenever it may deem fit to do so.

(viii) Where the insolvent is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, or is a woman who according to the customs and manners of the country ought not to be compelled to appear in public, the Court may make an order dispensing with such examination, or directing that the insolvent be examined on such terms, in such manner and at such place as the Court seems expedient."

Section 24 (1), (a).—At the hearing the court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition. The condition on which a creditor or a debtor

may make a petition for insolvency are given in sections 9 and 10. S. 24, One of the conditions of a creditor's petition is that the debtor should (1). owe to him a debt amounting to 500 rupees. It is the duty of the court under section 24, to inquire into the creditor's debt and also generally to follow the procedure laid down in that section (1). It has been further held by the Lahore High Court that the insolvency court is bound to inquire into the existence of the petitioning creditor's debt and cannot refer him to a separate suit (2). The Bombay High Court has, however, taken the view that the petition can be stayed and the petitioning creditor directed to establish his debt in a regular suit (3).

Proviso, 24 (1) (a).—One of the conditions which the debtor must satisfy is that he is unable to pay his debts. Under section 25, sub-section 2, a debtor's petition is to be dismissed if the court is not satisfied of his right to present the petition. The combined effect of these two provisions is that at the hearing of a debtor's petition the court has to decide whether the debtor is unable to pay his debts on the date of the petition or not. This is a matter which can be finally decided only after there has been a thorough inquiry into the affairs of the insolvent, as to find his inability for payment of debts a complete survey of his assets and his liabilities is indispensable. But that is plainly impossible at the stage of the hearing before the passing of an order of adjudication. The legislature has, therefore, provided that in order to prove his inability to pay his debts, the debtor shall be required to furnish only such proof as to satisfy the court that there are *prima facie* grounds for believing the same; and that as soon as that is done, the court is not bound to hear any further evidence. Even for a *prima facie* proof the court has got to look into the assets and liabilities of the insolvent. Most debtors are dishonest and this is usually the case when he himself applies for insolvency. As a matter of fact his schedule generally contains incorrect statements. Either he shows fictitious debts to show increased liabilities or he fraudulently omits to show property which is either in his own possession or which he has nominally transferred in favour of his relations and friends before coming in the insolvency court. In other respects too, he may be guilty of bad faith. He might not have kept any accounts, or if he has any, he suppresses them and does not produce before the insolvency court. Otherwise too he may refuse to afford assistance to the court because failure to perform the duties imposed upon him by section 22 cannot be penalised till he applies for his discharge. The extent to which the courts will examine the financial position of the debtor before adjudging him an insolvent will depend upon how far it is necessary to form a *prima facie* opinion about the debtor's inability to pay his debts. And this must depend on the circumstances of each case. The actual working of the proviso has, however, caused considerable difficulty and has given rise to a mass of judicial decisions which are not always possible to reconcile. The question is essentially one of fact, *viz.*, the debtor's inability to pay his debts, and the same amount of evidence which may be insufficient in one case for supporting a finding may be sufficient in another case. We proceed to note and summarise the decided cases but in reading what follows it must be borne in mind that the observations made in those cases were based on the facts which existed

(1) *Nathu v. Ghulam Dastgir*, 96 I. C. 424 : A. I. R. 1926 Lahore 638 (2); *Ram Parshad v. Rattan Chand*, A. I. R. 1934 Lah. 128 (1); 138 I. C. 910.

(2) *Hukam Chand v. Ganga Ram*, 99 I. C. 666 : A. I. R. 1927 Lahore 111.

(3) *Gopikabai Mahadev Bavdekar v. Chapsi Furshottam Lahana*, A. I. R. 1935 Bom. 80 : 154 I. C. 566 : 59 Bom. 161.

S. 24 there and that they should not be taken in the absolute and unqualified manner in which they appear to have been laid down.

If a creditor alleges that a debtor's petition is a mere sham and that the petitioner has ample means with which he can pay his debts, the court would allow his creditor to substantiate his allegations (1). In order to decide the debtor's inability to pay his debts, the present value of the properties which are available for meeting the liabilities of the debtor should alone be considered (2). The debtor's statement as to the correctness of the debts and properties mentioned by him in the schedule may amount to sufficient proof if the court does not, for any special reasons, disbelieve him (3). A searching inquiry into the debtor's affairs is not necessary (4), but the court is not bound to accept the statement of the petitioner (5), though at the same time it will not refuse to act upon it without any rebuttal thereof (6). The hearing of the petition is no mere formal matter. When the petitioning debtor's case bears no books of account, it is the duty of the court to be satisfied *prima facie* and, after following the necessary procedure and making the necessary investigation, to come to a conclusion that the statements by the debtor are proved before the petition can be granted (7). A definite finding on the point of the debtor's inability to pay his debts is essential (8). The finding must be arrived at like any other finding by the judicial tribunal in which the reasons for so holding are stated in such a way that it may be checked against the evidence and weighed in the balance (9). Where there is no evidence on the record to the effect that the debtor is possessed of sufficient property with which he might be considered to pay off his debts, an order of adjudication should be passed (10), but this will not be true where the assets of the insolvent, though inalienable under the Land Alienation Act of the Punjab, are valued at 5 times the total of his debts (11). If a debtor is unable to prove that he cannot pay his debts, the court has power to dismiss his petition under section 25 (12). If his first application is dismissed and he files a second application, the court should not take the allegation of the petition as correct without further proof (13).

Inquiry into the debts of the insolvent.—There appears to be some conflict as to how far the court should inquire into the fictitious nature of the debts shown in the schedule. The true rule appears to

(1) P. L. T. A. L. Arunacherun Chetty v. Maung Po Thin, 9 I. C. 461.

(2) Gopal Prasad v. Bhaneshwar, 108 I. C. 433 : A. I. R. 1928 Nag. 226 ; Satish Chandra Adva v. Firm Rai Narain Pakhir, 72 I. C. 60 : A. I. R. 1924 Cal. 436 : 72 I. C. 60.

(3) Nihal Chand v. Gila Ram, A. I. R. 1930 Lah. 75 : 127 I. C. 720 ; Bohola Karaim v. D. D. Desai, 100 I. C. 1004 : A. I. R. 1927 Rang. 329 (2).

(4) Kaka v. Nandoo, 125 I. C. 638 : A. I. R. 1930 Lah. 644.

(5) Jagarnath Sahu v. Beni Prasad, 12 Patna 866 : A. I. R. 1934 Patna 97 : 147 I. C. 842.

(6) Amir Chand v. Bhag Singh, 114 I. C. 54 : A. I. R. 1929 Lah. 49.

(7) Ganesh Lal Sarawgi v. Sanehi Ram, 12 Pat. 107 : A. I. R. 1933 Patna 43, followed in A. I. R. 1934 Patna 97.

(8) Maung Po Sai v. Bank of Chettinad, Ltd., 13 Rang. 717 : 160 I. C. 109 : A. I. R. 1936 Rang. 26.

(9) Mathura Ram v. Baldeo Ram, 80 I. C. 21 : A. I. R. 1924 All. 800 (2).

(10) Hinga Lal v. Jawahir Prasad, 114 I. C. 126 : 5 O. W. N. 964 : A. I. R. 1928 Notes 65 (c).

(11) Dad Khan v. Chandi Ram, 89 I. C. 585 : A. I. R. 1925 Lah. 630.

(12) Siya Ram v. Bohra Kishori Lal, 147 I. C. 11 : A. I. R. 1933 All. 841.

(13) Bazgulkhan v. Abdul Latif, 154 I. C. 874 : A. I. R. 1934 Pesh. 25.

be that though an inquiry, if necessary, into the real nature of the debts may be made, an elaborate inquiry into the debtor's list of debts is not necessary (1). An inquiry should be made where the court has reasons to believe that all the debts are fictitious debts (2). The creditor should not be refused to lead evidence to show that several of the debts are fictitious (3). The mere fact that some of the debts entered into the petition are fictitious would not by itself justify an order of dismissal of the petition though it should be taken into consideration at the time of discharge (4).

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(1).

Inquiry into concealment of assets.—At the stage of the application for adjudication no very careful inquiry is necessary with regard to the inability to pay his debts. If the court is satisfied that a *prima facie* case is established by the debtor the court will adjudicate him an insolvent; and the consideration of the further question as to whether there has been a concealment of property by fraudulent and benami transfers or otherwise is deferred till the stage when the discharge is applied for (5). The proviso to sub-section 1 of section 24 requires the debtor to furnish only such proof as to satisfy the court that there are *prima facie* grounds for believing that he is unable to pay his debts. If a deed of transfer is produced before a court, such a deed is *prima facie* evidence of the transfer and if the party opposing the application for adjudication wants to establish that the transfer is not a real transfer but it is a fictitious or benami transfer it is for him to prove it, and in the absence of such proof the court is to presume that the transfer is a real transfer. There is no provision in section 24 to enable the creditors to produce evidence in support of their allegations that the transfer is a benami transfer at the stage of the application for adjudication. Under sub-section 2 the creditor has a right to question the debtor as regards his conduct, dealings and property; but there is nothing in the section which should empower the creditor to produce substantive evidence as regards the concealment of the property by the debtor. It is only at the stage of making the order of discharge that the question as regards the concealment of the property or the question of the debtor being guilty of any fraud or fraudulent breach of trust can be raised, and it is only at that stage that the creditors are entitled to adduce evidence on these points (6).

(1) Manindra Nath v. Rasik Lal, 97 I. C. 463: A. I. R. 1927 Cal. 69; Amir Chand v. Bhagsingh, 114 I. C. 54: A. I. R. 1929 Lah. 49; Ram Rattan v. Nathuram, 109 I. C. 552: A. I. R. 1929 Lah. 87; Jeer Chetty v. Ranga Swami Chetty, 12 I. C. 618: 36 Mad. 402; Imamdin Rupa Jhangli v. Atmaram, 132 I. C. 11: A. I. R. 1930 notes 21 (b); Sashi Bhushan Maity v. Fani Bhushan Bose, A. I. R. 1934 Cal. 27: 141 I. C. 131; Narainappa v. Bheemappa, 92 I. C. 541: A. I. R. 1926 Mad. 494.

(2) Sri Ranga Chariar v. Narasimha Iyer, 133 I. C. 290: A. I. R. 1928 Mad. 1198.

(3) Kanshi Ram v. Jugal Kishore, 144 I. C. 102: A. I. R. 1933 Lah. 629.

(4) Allah Bakhsh v. Chanan Das Daya Das, 126 I. C. 192: A. I. R. 1930 Lah. 738.

(5) Bhagirnath Chaudhury v. Mt. Jamni, 101 I. C. 445: A. I. R. 1927 Patna 188; Bava Jeer Chetty v. Bava Ranga Swami Chetty, (1911) 2 M. W. N. 480: 12 I. C. 618; Bidhata Din v. Jagannath, 14 I. C. 570; Ganeshi Lal v. Dwarka Ram, 98 I. C. 900: 27 P. L. R. 734: A. I. R. 1927 Lahore 27; Laxmi Bank, Ltd., v. Ram Chandra Narayan Apte, 67 I. C. 238: 46 Bom. 757: A. I. R. 1922 Bom. 80; Sashi Bhushan Maity v. Fani Bhushan Bose, 148 I. C. 131: A. I. R. 1934 Cal. 27.

(6) Narain Misri v. Ram Das, 111 I. C. 647: 7 Patna 771: A. I. R. 1928 Patna 477.

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(2).

Bad faith ; inquiry into.—Questions relating to alleged bad faith or fraud or non-disclosure of the true financial position and the conduct of the insolvent generally arise for decision only when the debtor applies for an order of discharge. They are not relevant to an inquiry under the section. If the petitioner had obviously brought his case within the four corners of the Act he is entitled to an order of adjudication as a matter of right (1).

Section 24 (b) (1) ; service on debtor of the order admitting a petition.—When the petition is presented by a creditor and his petition is admitted, it is provided by section 19, sub-section 3 that the debtor shall be served with a notice in the manner provided for service of summons. Before the court can proceed to consider the creditor's petition it should be satisfied that the debtor has been duly served. If at the hearing the court finds that the debtor has not been served it may adjourn the hearing for another date under section 24 (1). If the non-service of the debtor was caused by the fault of the petitioning creditor it may also dismiss the petition under section 25 (1). The notice is to be served in the manner provided for the service of summons and for determining whether there has been valid service or not, the court shall look to the provisions of the Code of Civil Procedure.

S. 24 (1) (c). Commission of act of insolvency.—The commission of an act of insolvency by the person is the very foundation of the insolvency court's jurisdiction for intervening in the affairs of that person. Under section 7 a petition for insolvency can be presented only when a debtor commits an act of insolvency and not in any other case, though by the explanation to that section the presentation of a petition by the debtor is by itself an act of insolvency. Where the creditor is the petitioner, he is required not only to give proof of the conditions laid down in section 9, but also he must prove that the debtor has committed an act of insolvency as defined in section 6 of the Act. The court, before it can adjudicate a person an insolvent, must record a definite finding that he has committed an act of insolvency as defined in section 10 (2). For the purpose of that finding the court will and ought to confine itself to the particular act of insolvency alleged in the petition. See generally commentary under section 7.

Sub-section (2). Examination of the debtor.—The sub-section provides for the examination of the debtor as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors have a right to question the debtor thereon. The object of the examination is to enable the court to know about the financial condition of the debtor and the causes of the failure of his business. At the hearing the court is to determine the debtor's inability to pay the debts, it being one of the conditions of a debtor's petition. Having regard to the limited powers of inquiry which the court has under the proviso to section 24 (1) (3), it appears that the legislature has made the provision for the examination of the debtor before the order of adjudication for the purpose. The examination of the debtor shall be evidence against him in the insolvency proceedings. It is mandatory. Before the

(1) *Kaka v. Nandoo*, 125 I. C. 638 : A. I. R. 1930 Lahore 644; *Hamid Ali v. M. Ihtisham Ali*, 6 I. C. 748; *Abdul Kuddus Kazi v. Mutual Indemnity and Finance Corporation, Ltd., (India)* A. I. R. 1930 Cal. 576 : 128 I. C. 182.

(2) *Jagan Nath v. Ram Sarn*, 115 I. C. 419 : A. I. R. 1929 Lahore 239.

(3) *Harsukdas Balkishendas, Exp.*, 83 I. C. 941 : A. I. R. 1924 Cal. 964.

court can proceed to decide the petition under section 25 it is bound to examine the debtor (1). It is immaterial that any other evidence is taken or not, the debtor must be examined (2). The examination is necessary whether the insolvency petition is presented by a debtor or a creditor (3).

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(2).

Failure to examine the debtor.—The provisions of the sub-section being mandatory, the failure to observe it vitiates the proceedings, whether the petition is granted or dismissed under section 25 (4).

The contrary view was taken in a Rangoon case (5). In that case the petition was presented by a creditor and the debtor though present at the hearing was not examined. The Rangoon view was considered and dissented from by the Peshawar Court in *Popa Ram v. Barakhan* (6). The examination is, however, necessary only if the debtor is present at the hearing and not otherwise and the burden of proof that the debtor was present at the hearing will be on the person who complains of non-compliance with the sub-section (7). In a Lahore case there are certain *obiter* observations that it is the duty of the petitioner debtor to put himself in the witness box and to give actual account of his conduct and dealings (8). It is submitted that the decision cannot be taken as an authority for the proposition that where the petitioner himself fails to put himself in the witness box without being asked by the court, it will be only an irregularity not vitiating the proceedings. The Rangoon view has been followed by the Nagpur High Court (9).

Examination under other Acts.—The corresponding provisions under the Presidency-towns Insolvency and the Bankruptcy Acts are much more comprehensive, and it is submitted that some of those provisions, though not all, will be followed by the Provincial Courts on general principles. It is provided by the English Acts that the examination shall be on oath and it shall be the duty of the debtor to answer all such questions as a court may put or allow to be put to him. The scope of the inquiry or examination is not only limited to insolvency offences or in connection with his bankruptcy, but it extends to all matters which the court may take into consideration on the application for his discharge or which may lead to the discovery of further assets (10). The examination is for the protection of the public as well as for the sake of the creditors, and a debtor cannot refuse to answer a question merely on the

(1) *Banarsidas v. Banarsidas*, 14 I. C. 416; *Ralaram Santram v. Gayan Singh*, A. I. R. 1930 Lahore 746; 126 I. C. 439; *Amir Chand v. Bhag Singh*, 114 I. C. 54; A. I. R. 1929 Lah. 49; *Murli v. Sohan al Bansi Lal*, A. I. R. 1930 Lah. 855; 127 I. C. 560; *Butamal v. Gandu*, 93 I. C. 953; A. I. R. 1926 Lah. 508.

(2) *Banarsidas v. Banarsidas* *Supra*.

(3) *Popa Ram v. Barakhan*, A. I. R. 1935 Pesh. 139.

(4) *Gangadas v. Percival*, 97 I. C. 792; A. I. R. 1927 Cal. 32; *Bala Ram Sant Ram, v. Gayan Singh*, A. I. R. 1930 Lah. 746; *Poparam v. Bara Khan*, A. I. R. 1935 Pesh. 139.

(5) *Maung Chit v. S. P. Y. S. P. Chettyar firm*, 10 Rang. 187; 107 I. C. 671; A. I. R. 1932 Rang. 67.

(6) A. I. R. 1935 Pesh. 139.

(7) *Anant Kumar Saha v. Sadhu Charan Saha*, A. I. R. 1926 Cal. 234; 87 I. C. 751.

(8) *Ram Rattan v. Nathuram*, 109 I. C. 552; A. I. R. 1929 Lah. 87.

(9) *Sitaram Baji Rao v. Amrit Rao Ganpat Rao*, A. I. R. 1937 Nag. 226.

(10) *Re. Atherton*, (1912) 2 K. B. 251; *Re. Jewepp*, (1929) 1 Ch. 108.

S. 25. ground that it might incriminate him (1). As provided by sub-section 4 of the section the memorandum of the substance of the examination of the debtor is to be made by the Judge and it shall form part of the record of the case. The memorandum may be used in evidence against the debtor not only in the insolvency proceedings but also in any other proceedings taken against him personally. Thus the answers given in the examination are evidence against him on an application to strike off his name as a solicitor on the ground of misconduct (2) or in a criminal proceeding instituted against him under Ss 103 and 104, P-t. I. A. (3). The answers are not evidence where the proceedings are taken against the debtor in his representative capacity (4) nor they can be taken as evidence against parties other than the debtor himself even in subsequent proceedings in the same bankruptcy (5).

Where the insolvent is called as a witness as to any matter arising in his insolvency, it is open to any party, including the party calling him, to elicit from him in cross-examination what account he has given of the matter in his public examination (6). Under sub-section (4) a memorandum of the substance of the examination of the debtor is made by the Judge and it forms part of the record. Under the English Act it is provided that such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to the debtor and signed by him. It has been held under that Act, as also under the Presidency-towns Insolvency Act, that where the notes are not read over to or by the insolvent or are not signed by him, they cannot be used as evidence against him, but this does not exclude other ways of proving the insolvent's admission made at his examination and that the admissions may be proved by the oral evidence of the person who took the notes (7).

Sub-Section 3.—See commentary under heading 2+ (1) (a) Proviso above.

Sub-Section 4.—See commentary under sub-section 2 above.

25. (1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

(2) In the case of a petition presented by a debtor,

(1) *Re. Paget*, (1927) 2 Ch. 85.

(2) *Re. A Solicitor*, 1890, 25 Q.B. D. 17.

(3) *Moti Lal v. Emperor*, 113 I. C. 851 : A. I. R. 1929 Cal. 80.

(4) *New France & Garrard's Trustee v. Hunting*, (1897) 1 Q. B. 697.

(5) *Re. Brunner*, 19 Q. B. D. 572, *Re. Bottomley*, 84 L. J. K. B. 1020 ; *Janendra Bala Devi v. Official Assignee of Calcutta*, 54 Cal. 251 : 93 I. C. 834 : A. I. R. 1926 Cal. 597, (Proceedings under section 7, P-t. I. A.) ; *Ruchiram v. Radha*, (1922) 49 Cal. 93 : 66 I. C. 15.

(6) *Re. Cunningham*, (1899) 6 Mans 199 : 80 L. T. 503.

(7) *R. V. Erdhein*, 1896, 2 Q. B. 260 : *Re Joseph Perry*, (1919) 46 Cal. 996 : 54 I. C. 478

the Court shall dismiss the petition if it is not satisfied of his right to present the petition. **S. 25.**

History.—Sub-section 1 of the present section corresponds to section 15, sub-section 1, of the Act 3 of 1907. Sub-section 2 of the present section is new. Under the old Act there was no express provision prescribing the dismissal of the debtor's petition or any provision stating the grounds, which, if not established, made the debtor's petition liable to dismissal.

Analogous Law.—See commentary under section 24.

Section 25, sub-section (1), Scope.—In sub-section 1 are given the cases when the creditor's petition for insolvency shall be dismissed. They are:—

- (i) where the court is not satisfied with the proof of the creditor's right to present the petition, or
- (ii) of the service on the debtor of notice of the order admitting the petition, unless an adjournment is given under section 24, or
- (iii) of the alleged act of insolvency; or
- (iv) where the court is satisfied that the debtor is able to pay his debts; or
- (v) where the court thinks that for any other sufficient cause the petition should not be granted.

The general procedure which the court should follow under the section is this: When an act of insolvency is alleged, the learned judge must first satisfy himself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify his petition under the Act. The court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons, with the proof of the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts and when the learned judge has come to all the necessary findings on the issues indicated above and he still finds that there are *prima facie* grounds for making the order against the insolvent, he must consider whether there is any other sufficient cause for not making the order. If on the other hand it is found that the issues have not been made out against the insolvent, he will dismiss the petition without considering any other sufficient cause. But he must take either one or two of these two courses (1).

Proof of his right to present the petition.—The petitioning creditor's debt must be proved not only to have existed at the time of presentation of the petition but also to have continued to exist at the hearing and down to the making of the order of adjudication (2). For the purpose of proving his debt the petitioning creditor may call for the production of the debtor's books and call the debtor himself as a witness to prove the allegations in the petition (3), but he cannot have discovery from the debtor before the hearing (4).

Service of notice on debtor.—See commentary under section 24 and section 18.

(1) *Tara Chand v. Jugal Kishore*, 83 I. C. 967; 46 All. 713; A. I. R. 1924 All. 686.

(2) *Exp. Hammond*, L. R. 16 Eq. 614.

(3) *Re. X. Y.*, (1902) 1 K. B. 93.

(4) *Re. A Debtor*, (1920) 2 K. B. 59.

S. 25 **Proof of act of insolvency.**—See commentary under section 24
(1). and section 7.

Debtor's ability to pay his debts.—No one who is able to pay his debts can be adjudged an insolvent. Where the debtor is the petitioner and asks to be adjudged insolvent, it is for him to prove that he is unable to pay his debts and his creditors can oppose the application and show that he can. Where a creditor is the petitioner and is entitled to present a petition against the debtor, the latter can successfully oppose his being adjudged insolvent by proving that he is able to pay his debts. The onus lies on the debtor to prove this fact (1). Although a debtor may have assets, which if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he is not able to pay his debts within the meaning of section 4 (b), Presidency-towns Insolvency Act, corresponding to the present section (2).

Under the Act 3 of 1907, it was not necessary for a debtor petitioner to prove that he was unable to pay his debts. The question of ability or inability to pay his debts could arise only under section 15 sub-section (1), corresponding to the present section on a creditor's petition (3). Now the question always arises whether the petition is presented by a debtor or a creditor. In one case, the debtor is to prove his inability to pay his debts for getting himself adjudged insolvent and in the other case the debtor has to prove his ability to pay his debts to avoid an order of adjudication being passed against him.

For any other sufficient cause.—As we have seen under section 10, under the Act 3 of 1907, there was a conflict of opinion as to whether a debtor's petition could be dismissed on any ground like an abuse of the process of court etc., even if he complied with the terms of section 6 of that Act (corresponding to section 10 of the present Act). For finding an authority for dismissing a debtor's petition where it was, in the opinion of the court, an abuse of the process of the court reliance was placed on the expression "for any other sufficient cause", occurring in the present section (4). But the general consensus of opinion was that the expression applied to a creditor's petition only (5).

The language of section 15 of the Act 3 of 1907 was not quite clear as to whether the expression "for any other sufficient cause" applied to a creditor's petition only or not. The present section has now made it quite clear and under the present Act there can be no doubt that the discretion

(1) *Kaluram v. Gitwar Singh*, A. I. R. 1930 Lahore 592 (2) : 126 I. C. 445; *Gadi Bhikaji Dhangara v. Govind Bapuji Puramik*, A. I. R. 1937 Nag. 127.

(2) *Rameshwar Partapmal v. Chuni Lal Jahauri*, 60 Cal. 345 : 144 I. C. 142; A. I. R. 1933 Cal. 417; *Gadi Bhikaji Dhangara v. Govind Bapuji Puramik supra*.

(3) *Raj Kaur v. Tirath Ram*, A. I. R. 1917 Lah. 271 : 39 I. C. 590.

(4) *P. L. T. A. L. Arunachalam Chetty v. Maung Po Thin*, 4 B. L. T. 17 : 9 I. C. 461. (Overruled in *Tunya v. Subbaya Pillay*, 18 I. C. 500 : 5 B. L. T. 277 : 6 L. B. R. 146.)

(5) *Tunya v. Subbaya Pillay*, 18 I. C. 500 : 5 B. L. T. 277 : 64 L. B. R. 146; *Mi Bu v. Nga Po Saungh*, U. B. R. 1911, 1st Quarter 84; *Rattan Malik v. Tirath Ram*, A. I. R. 1914 Lah. 501 : 34 P. L. R. 1916 : 29 I. C. 361; 9 I. C. 632; *Girwardhari v. Jai Narain*, 32 All. 645 : 7 I. C. 39 : 7 A. L. J. 835; 15 C. W. N. 213; 12 C. L. J. 400 : 7 I. C. 394; 15 C. W. N. 244; 12 C. L. J. 445 : 7 I. C. 691.

implied in the expression "for any other sufficient cause" can be exercised by the court in the case of a creditor's petition only.

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(2).

What are not sufficient grounds for dismissing the petition.—

There may be cases in which the court will refuse to make an order of adjudication where the debtor tendered payment of the debt and costs to the petitioning creditor and was refused by him (1). Where the tender is made before the presentation of the petition and so refused, it seems that the court may refuse adjudication even though the debtor had before such tender committed an act of bankruptcy. In an English case, where a debtor had, before the act of bankruptcy was committed, tendered a part of his debt at the express request of the creditor, which was refused solely in order to keep a debt of over 50 pounds subsisting, the petition was dismissed on the ground that it was an abuse of the process of the court (2). Where the tender is made after the act of bankruptcy is committed the creditor is fully justified in refusing the money (3). Tender of a part of the debt by the debtor without any request on the part of the creditor, for the purpose of bringing the balance below the sum of 50 pounds, may, it is submitted, be justly refused by the creditor; and his petition will not be dismissed on that ground (4).

The possibility, or even probability, that there will be no assets to distribute is not sufficient for dismissing the petition. For at the time of the hearing the court as a general rule will not have sufficient materials before it to decide the question (5), and for this purpose the affidavit of the debtor alone will not suffice as an evidence of the fact that there are no assets (6). But where the court is satisfied that if the debtor is adjudged insolvent, the debtor's sole asset will be destroyed (7), or that, having regard to all the circumstances of the case, there cannot be any asset, or any reasonable prospect or probability of any coming into existence (8), it will in the exercise of its discretion dismiss the petition. If there are assets, it is no ground for dismissing the petition that they will be all exhausted in costs (9).

Again, the mere fact that the debtor has only one creditor is not of itself a sufficient cause for refusing a receiving order (10), nor is it a sufficient cause that the debtor has executed an assignment for the benefit of his creditors however beneficial to them, the petitioning creditor not having assented to the deed (11). The court will not refuse to make a receiving order even where the deed has become unimpeachable by lapse of time, unless it is convinced not only that there are but also that there will be no asset in the bankruptcy (12).

(1) William's Bankruptcy Practice, 14th Edition, p 57.

(2) *Re A Debtor*, (1928) Ch. 665.

(3) *Re Lowe*, 7 Mor. 95; *Re Gentry*, (1910) 1 K. B. 825 :

(4) William's Bankruptcy Practice, 14th Edition, p. 58.

(5) *Re Leonard*, 1896, 1 Q. B. 473, *Re Murietta*, 3 Mans. 35; *Re Birkin*, 3 Mans. 291, *Re Belton*, 108 L. T. 344, per Phillimore, J. at p. 345.

(6) *Re Birkin*, 3 Mans. 291.

(7) *Re Otway*, 1895, 1 Q. B. 812 (The bankrupt's only asset was a life-interest terminable on bankruptcy).

(8) *Re Betts*, (The bankrupt was an undischarged bankrupt in a prior bankruptcy and had large outstanding liabilities), 1897, 1 Q. B. 50; *Re Somers*, 4 Mans. 227.

(9) *Re Jubb*, 1897, 1 Q. B. 641.

(10) *Re Hecquard*, 24 Q. B. D. 71.

(11) *Exp. Dixon*, 13 Q. B. D. 118.

(12) *Re Scott*. 58 S. J. 11.

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(2).

What is sufficient cause for dismissal.—Where the court is of opinion that the bankruptcy petition is presented not with the *bona fide* view of obtaining an adjudication but for an inequitable or collateral purpose it shall be dismissed (1). Thus the petition will be dismissed where money has been extorted (2), or attempts are made to extort or to get an undue advantage secretly over the other creditors (3). A creditor, who has acted in any way, that it should be equivalent to an assent, recognition or approval of a certain arrangement or who had taken advantage or was willing to take advantage of an arrangement come to between him and the debtor in order to realise the money due to him without recourse in the first instance being had to the attached properties being put up for sale, should not be allowed to turn round and proceed in bankruptcy as if there had been a clean slate from the start (4). A creditor who takes legitimate steps for enforcing payments of the debts due to him is entitled if his demands are not satisfied to proceed in bankruptcy. But, on the other hand, if, as a matter of fact, indications are not wanting in the affidavits on record, which show that the proceedings in bankruptcy and the persistence in them are spiteful, that in itself is a sufficient cause for refusing, on the petition of the creditors, to make an adjudication order (5). In the absence of fraud or extortion the mere fact that the petitioning creditor is actuated by a motive other than the mere desire to obtain distribution of the debtors' assets in bankruptcy, *e.g.*, a wish to put an end to partnership with the debtor, will not constitute an abuse of the process of the court or disentitle the petitioning creditor to his order (6). Similarly a creditor whose debt is insufficient to support a petition may buy up another debt for the purpose of the petition, and if there are no circumstances showing pressure on the debtor or an attempt to get an inequitable advantage over third persons, a receiving order will be made (7). So also, in the absence of pressure or extortion it is open to a creditor to consent to a dismissal of the petition upon the terms of the debtor agreeing to pay a fresh debt of increased amount and then, on default being made by the debtor, to present a certain petition on the new debt (8).

Under section 35 of the Act an adjudication of insolvency, once made, may be annulled where in the opinion of the court a debtor ought not to have been adjudged insolvent. Under the present section, a petitioning creditor's petition may be dismissed for any sufficient cause. In the case of a petitioning creditor's petition it seems that the grounds for refusing an order of adjudication will be similar to those which may be held sufficient for annulling an adjudication (9).

(1) *Exp. King*, 3 Ch. D. 461; *Exp. Griffin*, 12 Ch. D. 480.

(2) *Re Atkinson*, 9 Mor. 193; *Re Otway*, 1895, 1 Q. B. 812.

(3) *Re A Debtor*, 91 L. T. 664, affirmed *subnom Re Goldberg*. 21 T. L. R. 139; *Re Shaw*, 83 L. T. 754.

(4) *Re A Debtor*, 1928, 1 Ch. 199; See, however, *Mahabir Prasad v. Ram Tahal Mandar*, A. I. R. 1937 Pat. 665, where an order dismissing a creditor's petition under S 7 *in limine* on the ground that it was harrassing and coercive was set aside.

(5) *Harsukdas Balkishendas, Ex parte*, 83 I. C. 941; A. I. R. 1924 Cal. 964.

(6) *King v. Henderson*, 1898, A. C. 720.

(7) *Re Baker*, 5 Mor. 5; *King v. Henderson*, 1898, A. C. 720.

(8) *Re Bebro*, 1900, 2 Q. B. 316, distinguished in *Re A Debtor*. 1928 1 Ch. 199 and *Re Hay*, 110 L. T. 47.

(9) *Exp. Christie*, M. & B. 314; *Exp. Browne*, 1 Rose. 151; *Exp. Wilbran*, 5 Madd. 1; *King v. Henderson*, 1898 A. C. 720.

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(2)

Debtor's petition : its dismissal.—Now it is provided by the present subsection that the court shall dismiss a debtor's petition, if it is not satisfied of his right to present it. Under the Act 3 of 1907 it was held in some cases that a debtor's petition could be dismissed where the petition in the preliminary court was an abuse of the process of the court (1). Then came the decision of Their Lordships of the Privy Council in *Chhatarpat Dugar V. Kharag Singh Lachhmiram* (2) which is the leading case on the subject. There their Lordships considered sections 15 and 16 of the Act 3 of 1907 and held that the Provincial Insolvency Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the court's discretion, but is a statutory right ; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the court. Subsequent to this decision the law under the Provincial Insolvency Act has been placed beyond all doubts. All that the court has got to see on a debtor's petition is whether he has satisfied the conditions of section 10 when read in the light of the proviso to section 24 (a). We have considered this topic at length under section 19 and reference may be made to commentary thereunder as well. Under the Presidency-towns Insolvency Act, the Privy Council decision given above has not been followed by the Calcutta High Court on the ground that the wording of the sections in the two Acts is different (3).

Dismissal of petition for the debtor's bad faith.—Their Lordships of the Privy Council approved the current of authority in India to the effect that the bad faith or misconduct of a debtor is to be visited with its due consequences at the time of the debtor's application for discharge and not at the time of the initial proceedings (4). Under the Insolvency Chapter of the old Code of Civil Procedure, 1882, the debtor's conduct in respect of his creditors and in relation to the disposal of his own properties had to be taken into account at the time of the application for insolvency. The law under the Act 3 of 1907, was materially altered in that it made the conduct of the petitioner material only when he asked for an order of discharge (5). Under the Act 3 of 1907 as well as under the present Act, it has been held that a debtor's petition for insolvency cannot be dismissed on the ground that he has been, prior to insolvency proceedings, guilty of misconduct, dishonesty or bad faith and that these questions are to be considered only when the debtor applies for his discharge (6).

(1) *Malchand v. Gopal Chand Ghosal*, 1917, 44 Cal. 899 : 39 I. C. 199; A. I. R. 1917 Cal. 117.

(2) A. I. R. 1916 Privy Council 64 : (1916) 44 Cal. 535 : 44 I. A. 11 : 39 I. C. 788.

(3) *Re Ballab Chand Serowgee*, (1922) 80 I. C. 651 : A. I. R. 1923 Cal. 703.

(4) *Chhattarapatsingh Dugar v. Kharag Singh Lachhmi Ram*, A. I. R. 1916 Privy Council 64.

(5) *Udai Chand Maiti v. Ram Kumar Khara*, 7 I. C. 394 : 12 C. L. J. 400.

(6) *Muni Lal Katiar v. Shashi Bhushan Ray*, 60 I. C. 848 : A. I. R. 1921 Patna 315 ; *Muhammed Hussain v. Ilahi Bakhsh*, 17 I. C. 92 ; *Samir-ud-din v. Kadumoyee*, 7 I. C. 691 ; *Hamidali v. Ishtisham Ali*, 13 O. C. 94 : 6 I. C. 748 ; *Mi Bu v. Nga Po Saungh*, U. B. R. 1911, 1st. quarter 84 : 11 I. C. 745 ; *Muhammed Hussain v. Ilahi Bakhsh*, 17 I. C. 92 ; *Subbiar Pillai v. Abdul Rashid*, 9 I. C. 462 ; *Mohir-ud-Din Sarkar v. The Secretary Hadal Gramya Rindan Samiti*, A. I. R. 1920 Cal. 674 : 57 I. C. 977.

- S. 26.** Among the instances of bad faith may be cited the debtor's omission to keep regular accounts or to produce accounts, if any, on his being required by the court to do so (1); fraudulent concealment, or improper alienations of his properties (2); misappropriation of properties entrusted to him (3) or non-disclosure of the true state of affairs.

The fact that a person who applies to be adjudged an insolvent is the only son of his mother, who is possessed of a large property (4); or that the brother of the applicant has not joined in the application is not a sufficient reason for dismissing the debtor's petition (5).

Dismissal of petition for the debtor's bad faith under the Presidency-Towns Insolvency Act, 1909. Section 15, sub-section 3, was added by section 3 of the Presidency-towns Insolvency (Amendment) Act, 1927, Act 19 of 1927. Under that Act now, a debtor's petition can be dismissed if he fails to produce the books of accounts or fails to afford such assistance to the court as may be prescribed by the rules under the Act. The powers of the Presidency towns Insolvency Courts in dismissing a debtor's petition are wider than those which the Provincial insolvency court has

Miscellaneous.—Where a debtor's petition alleges facts sufficient, if established, to entitle him to present a petition under S. 26 (3), P. I. A. 1907, the court is bound, after completing the necessary inquiries, to come to a decision in respect of the various matters spoken of in section 15 of the Act and then dismiss the petition under that section, or to make an order of adjudication as provided for in section 16 (1) of the Act. Where the application was dismissed for want of prosecution on account of the absence of the applicant, it was held that the order of dismissal was wrong and that the court should have decided the application on the merits either dismissing it or granting it (6).

26. (1) Where a petition presented by a creditor is dismissed under sub-section (1) of Section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the debtor for the expense

(1) In the matter of Vithaldas Kalidas, 9 I. C. 633; Ganeshi Lal v. Dwarka Ram, 98 I. C. 900: 27 P. L. R. 734: A. I. R. 1927 Lah. 27; Sohna Mal v. Jewan Das, 142 I. C. 690: A. I. R. 1933 Lah. 330 (concealment of account books); Rajendra Nath Saha v. Rai Kishori Das, 59 Cal. 1279: 140 I. C. 495: A. I. R. 1932 Cal. 817.

(2) Sashi Bhushan Maiti v. Fani Bhusan Bose, 148 I. C. 131: A. I. R. 1934 Cal. 27; Teja Singh v. Balwant Singh, 123 I. C. 576: A. I. R. 1930 Lah. 16; Girwardhari v. Jai Narain, 7 A. L. J. 835: 7 I. C. 39: 32 All. 645; Ismail Jee Moosaji v. Manghal Mal Watoo Mal, 12 I. C. 622.

(3) Ganga Dutt Dube, *In re*, A. I. R. 1919 All. 344: 41 All. 486: 56 I. C. 192.

(4) Behari Lal Sahu v. Juthar Mall, 38 I. C. 822: A. I. R. 1916 Patna 181.

(5) Khadim Hussain v. Babu Bishan Singh, 9 I. C. 633.

(6) Netram v. Baghirathi, A. I. R. 1918 All. 368: 40 All. 75: 15 A. L. J. 885: 43 I. C. 160.

(6) Lachhmi Narain Dube v. Kishan Lal, A. I. R. 1918 All. 308: 46 I. C. 733: 40 All. 665.

or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realized as if it were a fine. S. 26.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

History.—This section corresponds to section 15, clauses (2) and (3) of the Act 3 of 1907. According to the common law of England an action lies for presenting a petition or procuring an adjudication falsely and maliciously, and without reasonable and probable cause, though no special damage or pecuniary loss be proved (1). There is no provision in the Presidency towns Insolvency Act like the one in the Provincial Insolvency Act. Cases arising under that Act are, therefore, governed by the common law.

Scope—Section 26 provides a speedy and an alternative remedy to the debtor who has been unnecessarily dragged in the insolvency court. In order that the debtor may be entitled to compensation under the Act, it is necessary that the following conditions should be satisfied :—

1. There should be an application by the debtor under this section. Without an application by the debtor the court cannot act of its own motion. Nor is the debtor bound to make an application. It is an alternative but not an exclusive remedy. It is open to the debtor to seek relief by way of suit in the ordinary courts of law.

2. The petition presented by a creditor has been dismissed under sub-section (1) of section 25. The section applies only when the application is dismissed on any one of the grounds mentioned in section 25. If an adjudication has been rightly or wrongly made and is subsequently annulled under section 35 on the ground that a debtor ought not to have been adjudged insolvent or on any other ground, an application under the section will not lie, but an action for damages under the ordinary law is maintainable.

3. The petition presented by the creditor was frivolous or vexatious. If the petition is dismissed but it was not frivolous or vexatious, no award of compensation can be made.

4. The debtor must have suffered expense or injury in consequence of the petition. The word injury shall, however, be interpreted in the widest sense and will not only be confined to actual damage or loss. The mere fact of insolvency imports damage to the credit of the debtor; it is a natural consequence, and the debtor is entitled to damages for injury to his credit and reputation. (2)

5. The compensation can be awarded only against the petitioning creditor. If the debtor also wants compensation against persons privy to the creditor or otherwise liable jointly with him, his remedy is a regular suit. Under this section creditor means one who has in fact presented the petition.

(1) *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329; *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674; *Wyat v. Palmer*, (1889) 2 Q. B. 106.

(2) *Wilson v. United Counties Bank, Ltd.*, (1920) A. C. 102, 120 (Bankruptcy of customer owing to negligence of the bank—suit by customer for damages).

i. 26. **Such amount, not exceeding one thousand rupees, as the court deems reasonable.**—The court can award compensation up to the maximum limit of one thousand rupees. It may award less or more according to the circumstances of each case. Within the maximum limit, the section gives a fairly wide discretion to the court.

Such amount may be realised as if it were a fine.—The compensation awarded under this section may be realised according to the provisions of S. 386, Cr. P. C., which provides for the realisation of fines imposed by criminal courts. Just as the section provides a speedy remedy for the award of compensation, so it provides an equally speedy and effective mode of realising the compensation so awarded.

Analogous law.—Under S. 35 (A), C. P. C., a civil court has power to award compensatory costs in respect of false or vexatious claims or defences. Under S. 250, Cr. P. C., 1898, a criminal court at the time of discharging or acquitting the accused may award compensation for false and frivolous or vexatious complaints.

Frivolous or vexatious.—In a case under S. 250, Cr. P. C., 1898, a Full Bench of the Calcutta High Court has held that the word “frivolous” indicates that the accusation was of a trivial nature, and the word “vexatious” implies that the accusation is one which ought not to have been made in the criminal court and which is intended to harass the accused (1). It would seem that the words “frivolous” and “vexatious” have the same meaning in this section. If so, proof of malice, which is a necessary ingredient in a common law action for damages, is not necessary to entitle the debtor to compensation under this section. All that has to be shown is that the petition was either frivolous or vexatious (2).

Sub section 2.—Once the debtor has applied to the insolvency court under this section and obtained its decision thereon, a separate suit by him is barred. An award under this section may be the dismissal of the application. Even in such a case the debtor's separate suit is barred.

Appeal.—An appeal lies against an order awarding or refusing to award compensation, *vide* section 75, schedule 1.

Cases not falling within this section—Cases which do not fall within this section or cases which might fall under the section but the debtor chooses to take them to ordinary courts shall be governed by the common law. According to the common law, an action lies for presenting a petition or procuring an adjudication falsely and maliciously and without reasonable and probable cause, though no special damage or pecuniary loss be proved (3). The mere fact of insolvency imports damage to the credit of the debtor; it is a natural consequence, and the debtor is entitled to damages for injury to his credit and reputation (4). In such an action it must be shown that the petition has been dismissed

(1) *Beni Madhub Kurmi v. Kumud Kumar Biswas*, (1903) 30 Cal. 123, 129; The decision was under section 250 before it was amended. See also *Pt. I. A.*, S. 39 (2) (g), and *C. P. C.*, 1908, S. 35-A.

(2) *Mulla*, 158.

(3) *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329; *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674; *Wyatt v. Palmer*, (1889) 2 Q. B. 103.

(4) *Wilson v. United Counties Bank, Ltd.*, (1920) A. C. 102, 120 (bankruptcy of customer owing to negligence of the bank—suit by customer for damages.)

or the adjudication annulled (1). The judgment of the insolvency court giving reasons for the dismissal of the petition is inadmissible in evidence against the creditor in such an action (2). S. 27.

Order of Adjudication

27. (1) If the Court does not dismiss the petition, it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge.

Order of adjudication.

(2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

History.—Section 16, sub section 1 of the Act 3 of 1907 ran as follows :—

“Where a petition is not dismissed under the preceding section, and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the Court in the manner hereinafter provided, a Court shall make an order of adjudication.”

The preceding section referred to has reference to section 25 of the present Act. Under the old Act, even in cases where the petition was not dismissed under S. 15, P. I. A. 1907, it was open to the debtor to propose a composition or scheme for acceptance of the creditors and approval by the court before the order of adjudication was passed. In providing for the consideration of composition schemes before an order of adjudication the old Act purported to follow the English law. It was, however, held that the provision was ineffectual. In England the creditor's debts are proved by affidavits sent to the Official Receiver before the first meeting of the creditors and so there the difficulty does not arise, whether the composition be before or after adjudication. In India debts are proved only after adjudication. For this reason under the old Provincial Insolvency Act a composition before adjudication was an impossibility notwithstanding the wording in sections 16 and 27 (3). The matter was carefully considered in an earlier case of the same court. There, during the pendency of an insolvency petition and before the adjudication was made, the debtors and the majority of their creditors arrived at a composition vesting the whole of the estate of the debtors in trustees empowered to liquidate the debts and providing for the *ad interim* stay of the petition. It was then held, that the application was premature and could not be granted before adjudication in the form applied for. It was remarked that section 27 of the Insolvency Act does not contemplate enquiry into debts by the trustees instead of *ipso facto* disposal of the petition. The Act requires the composition to be approved by a majority in number and three-fourth in value of the creditors whose debts have been proved,

(1) Metropolitan Bank v. Pooley, (1885) 10 App. Cas. 210.

(2) King v. Henderson, (1898) A. C. 720.

(3) Fleming Shaw and Co. v. Sadi Ram Jamnadas, A. I. R. 1916 Sind. 73 : 32 I. C. 565.

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which can only mean proved after an adjudication under sections 24 and 25 (1).

The words "and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the court in the manner hereinafter provided" have been omitted from the present section, thus making it clear that an order of adjudication must precede before any composition or scheme is considered and accepted by the court.

As already stated, the old Act did not provide for the debtor to apply for his discharge in all cases. This omission was used by dishonest debtors for evading the payment of their debts, at the same time without running any risk of their conduct coming under review by the insolvency court. To stop this loophole it has been now provided that the court should specify in its order of adjudication the period within which the debtor shall apply for his discharge, and sub-section 2 has been added to relax the rigour of the new provision by giving discretion to the court for extending the period so specified. A new section, section 43, was also added to provide for the annulment of the order of adjudication in case the debtor does not apply for an order of discharge within the period specified by the court.

Analogous Law.—The same provision is made in sections 13 (1) and 15 (1) of the Presidency-towns Insolvency Act. The wording of these sections is, however, different.

The Court shall make an order of adjudication.—The word used is shall and in a Privy Council case arising under the old Act it was decided that the word 'shall' is mandatory and the obtaining of the order of adjudication is a statutory right. For full treatment, see commentary under section 10. The grounds on which a petition for insolvency cannot be dismissed and an order of adjudication must be passed have already been considered under sections 24 and 25 of the Act. In the corresponding sections of the Presidency-towns Insolvency Act, the word used is 'may' and not 'shall,' thus giving to courts under that Act some discretion in the matter. The language of the present section is, however, pre-emptory and the Provincial courts are bound to pass an order of adjudication if the application is not dismissed under sections 24 and 25.

Order of adjudication ; what it should contain and what it should not.—The order of adjudication should be unconditional. Where the court at the time of adjudicating a person an insolvent also passed an order requiring him to pay a certain amount into court in payment of his debts, it was held that the second order was illegal and should not have been passed (2). An order of adjudication which also annuls alienations made by the debtor, even though those alienations constituted acts of insolvency, is illegal to the extent that it annuls the alienations (3). Such an order, if passed, will not bind the alienees and a suit by them for a declaration that the alienations are valid lies (4). Again an adjudication order should not contain any direction as

(1) *In re Asomal Versimal*, 9 I. C. 724.

(2) *Ramprasad Lohar v. Ramjee Marwari*, A. I. R. 1930 Rang. 236 : 126 I. C. 529.

(3) *Appi Reddi v. Appi Reddi*, A. I. R. 1922 Mad. 246 : 45 Mad. 189 : 66 I. C. 271.

(4) *Kambban Chenchayya v. Bandarupalli Bapayya*, A. I. R. 1932 Mad. 233 : 138 I. C. 31.

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to what property shall be liable for the payment of the insolvent's debt. Thus where an order of adjudication directed that shares of other persons in the family trade and property would be liable for the insolvent's debt, the order was amended in appeal by the omission of the said direction (1).

Shall specify the period within which the debtor should apply for his discharge.—The period within which the insolvent must apply for his discharge is to be specified in the order of adjudication itself. An order specifying this period passed more than two years after the order of adjudication under clause (1) of section 27 contravenes the law. The debtor is not bound by that order and his right to make an application for his discharge is not barred by reason of his not complying with that order, and the penalty prescribed by section 43 of the Act does not come into operation (2).

Sub-section 2, extension of period specified for an application for discharge.—The court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge. It is settled that where the application for extension of time is made before the time originally fixed expires the court can extend the period; and for the purposes of section 43 the period so extended shall be the period within which the debtor has to apply for his discharge. To this extent the word 'shall' in section 43 has been understood not to be mandatory. Where the application for extension is made after the expiry of the period originally fixed the court's power to extend the period has been considered in a very large number of rulings which we proceed to consider in the next paragraph.

It has been held by the Calcutta (3), Madras (4), Lahore (5), Sind (6), Patna (7), Allahbad (8) and Nagpur (9) Courts that the court

(1) *P. S. Sathivasagram Pillai v. Meenakshisundaram Aiyar*, A. I. R. 1921 Mad. 674 : 69 I. C. 485.

(2) *Gopal Ram v. Magni Ram*, A. I. R. 1928 Patna 338 (F. B.) : 7 Pat. 375 : 107 I. C. 830.

(3) *A. J. E. Abraham v. H. B. Sookias*, A.I.R. 1924 Cal. 777 : 51 Cal. 337 : 81 I. C. 584.

(4) *Jethaji Peraji Firm v. Krishnayya*, A. I. R. 1930 Mad. 278 : 52 Mad. 648 : 122 I. C. 351 ; *Arunagiri Mudaliar v. Kandaswami Mudaliar*, A. I. R. 1924 Mad. 635 : 83 I. C. 955, *per* Krishnan J. ; *Palani Goundan v. Official Receiver Coimbatore*, A. I. R. 1930 Mad. 389 (Full Bench) : 53 Mad. 288 : 124 I. C. 61 ; *Selvan Chettiar v. Y. P. N. Venkatachalam Chettiar*, A. I. R. 1931 Mad. 10 : 129 I. C. 36.

(5) *Lakhi v. Molar*, A. I. R. 1925 Lahore 416 : 86 I. C. 115 ; *Firm Jai Singh v. Normal Das*, 92 I. C. 235 : A. I. R. 1926 Lah. 24 ; *Fateh Muhammad v. Mayadas*, A. I. R. 1927 Lah. 763 (1) : 109 I. C. 134 ; *Sohnaram v. Tara Chand*, A. I. R. 1929 Lah. 399 : 117 I. C. 87 ; *Rup Singh v. Official Receiver Jhang*, A. I. R. 1928 Lah. 82 : 10 Lah. 357 : 107 I. C. 394 ; *Ghaus v. Ganga Ram*, 132 I. C. 223 : A. I. R. 1931 Notes 25 (a).

(6) *Salag Ram v. Official Receiver*, A. I. R. 1926 Sind. 94 : 91 I. C. 467.

(7) *Gopal Ram v. Magni Ram*, A. I. R. 1928 Patna 338 : 7 Pat. 375 : 107 I. C. 830 ; *Kunndamal Nathumal v. Anoofshe*, 108 I. C. 803 : A. I. R. 1928 Notes 26 (b.)

(8) *Narayan Das Mohan Lal of Benares, In re*, A. I. R. 1933 All. 231 : 144 I. C. 144 ; *Madho Prasad Vyas v. Madho Prasad*, 55 All. 241 : 145 I. C. 668 : A. I. R. 1933 All. 230 ; *Bohray Shankar Lal v. Bansidhar*, A. I. R. 1937 All. 686.

(9) *Ganapat v. Harigir*, 113 I. C. 357 : A. I. R. 1929 Nag. 11 ; *Ladu Ram v. Sukha Ram*, 27 N. L. R. 374 : 136 I. C. 873 : A. I. R. 1932 Nag. 22 ;

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has power to extend time even if the application for extension is made after the expiry of the period originally fixed.

The contrary view taken in the undermentioned cases (1) has been overruled by the later decisions of the same High Courts. In the Rangoon High Court the trend of decisions is not quite decisive. In A. I. R. 1927 Rang. 136 (2), the application for extension was made within the time fixed by the order of adjudication. The point under consideration here was not, therefore, directly raised in that case. In *Bindraban Dina Nath v. Official Receiver*, A. I. R. 1930 Rang. 166, the point was directly raised and decided in the negative. Bindraban's case was explained and distinguished by a Bench consisting of the same judges who decided that case in A. I. R. 1931 Rang. 27 (3). In *Vally Mohamed Cassim v. Haji Ayoob Haji Abbar and Co.* (4), the facts were: The judge was absent on the day fixed for applying for discharge and the insolvent did not apply on that ground. The case was posted to another date when the insolvent applied. The judge dismissed the application as being belated on the ground that he had no power to extend time. In appeal it was held that the judge had power to extend time and that he had power to consider the application. The previous two cases reported in A. I. R. 1930 Rang. 166 and A. I. R. 1931 Rang. 27 were sought to be reconciled in the following words:—"Bindra Ban Dina Nath's case is authority for the view that an extension of time cannot be given under the provisions of S. 27 clause (2), P. I. A. 1920, after the expiry of the period of time which it is desired to extend. Had the judge been sitting on 25th January, the date on which the period fixed for applying for discharge expired in the present case, and had the appellant appeared before him, R. M. K. R. M. Chettyar's case is clear authority for the view that the court could then have granted an extension of time." Again, "in R. K. B. M. Chettyar's case (2) it was clearly held that a judge could, on the day fixed for making an application for discharge, of his own motion extend the time. It would seem to follow from this that if, for some reason, such as the absence of the judge from his court, he is unable to decide whether an extension should be given or not, he has power to decide that matter when the case is first put before him for decision." A. I. R. 1933 Rang. 166 was doubted in A. I. R. 1933 Rang. 223 Full Bench (5).

The only Court which has taken a contrary view to the general trend of decisions is the Oudh Chief Court (6). In both the cases, a Patna case (7), since overruled by the same High Court, was followed. It is

(1) Chinnapa Reddy v. Thomasu Reddy, A. I. R. 1928 Mad. 265 : 51 Mad. 839 : 109 I. C. 381; Venugopala Chariar v. Chinnu Lal Sowcar, A. I. R. 1926 Mad. 942 : 49 Mad. 935 : 97 I. C. 706; Aruna Giri Mudaliar v. Kandaswami Mudaliar, A. I. R. 1924 Mad. 635 : 83 I. C. 955, per Waller, J.; *In re* Ram Krishna Misra, A. I. R. 1925 Patna 355 : 4 Patna 51 : 83 I. C. 70.

(2) K. K. S. A. R. A. Chettyar v. Maung Myat Tha, A. I. R. 1927 Rang. 136 : 100 I. C. 921.

(3) R. M. K. R. M. Chettyar v. Ko Po Thit, A. I. R. 1931 Rang. 27 : 128 I. C. 841.

(4) A. I. R. 1933 Rang. 133 : 144 I. C. 869.

(5) Jang Bir Singh v. B. K. Benerji, 145 I. C. 320 : A. I. R. 1933 Rang. 223.

(6) Amjad Ali v. Mohamed Ali, A. I. R. 1927 Oudh 506 : 2 Luck. 757 : 105 I. C. 912; Girja Charan v. Sheoraj Singh, A. I. R. 1928 Oudh 376 : 4 Luck. 22 : 111 I. C. 908.

(7) Ram Krishna Misra, *Ex parte*, A. I. R. 1925 Patna 355 : 4 Patna 51 : 88 I. C. 70.

hoped that the Oudh High Court will revise its opinion at an early date and come in line with the view taken by the other High Courts.

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Having noted the authorities on the point we proceed to consider the grounds on which that view is based. In the first place the words used in section 43 are that on the debtor's failure to apply for an order for discharge within the period specified by the court the order of adjudication shall be annulled. The last words have been interpreted to mean that the order of adjudication does not stand automatically annulled on the expiry of the fixed period ; and that an express order of the court to that effect is necessary. In the second place the word "shall" used in section 43 (1) is clearly directory and not mandatory so far as the period originally fixed might be extended on an application made before the expiry of that period. In the third place in sub-section 2 of S. 27 it has not been expressly provided that the period can be extended even after it has expired but similar words used in other enactments have been interpreted as including the power to extend time even if the original period fixed by the court has expired (1).

From the above arguments two propositions of law follow :—

1. So long as the order of adjudication has not been annulled by the court by an express order to that effect under section 43, the power given to the court by section 27 sub-section 2 can be exercised at any time.

2. On the analogy of similar provisions in other enactments, the power under section 27 (2) can be exercised by extending the period originally fixed even after the expiry of the original period. It is obvious that once an adjudication has been annulled the court has no jurisdiction to pass an order under section 27 (2). It is submitted that for holding the above view it is not necessary to decide that the word 'shall' in section 43 is directory and not mandatory. The power of annulling an adjudication under section 43 applies only when the debtor does not apply for the order of discharge within the period specified by the court. The last words obviously refer to section 27. The period is to be determined by section 27 alone. Where the period has been extended, the adjudication under section 43 is not annulled not because it is not obligatory on the court to do so but because an important condition of section 43 has not arisen, that is to say, it cannot be said that the debtor has not applied for an order of discharge within the period specified by the court.

It would be instructive to quote here the very useful criticism of Mr. Mulla on the subject under consideration :—

"There is a good deal to be said in favour of either view. The former view, namely, that the court has power to extend the time even after the expiry of the period originally fixed, is not negatived by the language of section 27. That section does not in terms limit the power to extend the time to cases where the application for extension is made before the expiry of the period originally fixed, and this seems to be the only ground on which that view can be supported. Analogies founded on this or that ruling of the Privy Council are misleading. In some of the cases in which this view was taken the courts relied upon the decision of the Privy Council in *Badri Narain v. Sheo Koer* (2), a case under

(1) *Badri Narain v. Sheokoer*, 1890, 17 Cal. 512 : 17 I. A. 1. (P. C.) ; *Bhagwan Das Bagla v. Haji Abu Ahmed*, 16 Bom. 263 ; *Raja Har Narain Singh v. Chaudarain Bhagwant Quar*, 1891, 13 All. 300 (P. C.) : 18 I. A. 55 ; *Rajabali v. Amir Hossein*, 1890, 17 Cal. 1 (P. C.).
(2) (1890) 17 Cal. 512 (P. C.) : 17 I. A. 1.

S. 27 section 549 of the Code of Civil Procedure, 1882, now O. 41 R. 10, of the
(2). Code of 1908. As against that may be cited a later judgment of the same tribunal in *Sabitri Thakurani v. Savi* (1), a case also under O. 41 R. 10, C. P. C. Still nearer home is Chhatrapat Singh Dugar's case (2), where the Privy Council held that the word "shall" in S. 16 (1) of the P. I. A. 1907, now section 27 (1) of the Act of 1920, means "shall" and not "may." Section 148 of the Code of 1908 has also been invoked in support of the same view, but to do so. it is respectfully submitted, is begging the question. If section 43 controls section 27 so as to take away the power of the court to extend the time after the expiry of the period originally specified, in other words, if under the Act itself the court has no such power, section 148 of the Code cannot come in, for the powers of the court in the exercise of its original civil jurisdiction are expressly made "subject to the provisions of this Act" by section 5 of the Act.

As to the latter view, namely, that section 43 is mandatory. it is to be observed that there was no such section in the Provincial Insolvency Act, 1907. Section 4 was introduced for the first time in the Act of 1920. It was taken from section 41 of the Presidency-towns Insolvency Act. The difference in the language of the two sections is striking. Under section 41, "the court may annul the adjudication or make such other order as it may think fit." Under section 43, "the order of adjudication shall be annulled." This shows what the intention of the legislature was. The legislature intended that a court exercising jurisdiction under the Provincial Insolvency Act "shall" annul the adjudication and that it should have no power to make such other order as it may think fit." Which-ever view be correct, it is high time that the legislature should intervene. It is suggested that section 43 should be left as it stands, and that section 27 should be amended so as to limit the power of the court to extend the time to cases where the application for extension is made before the expiry of the period originally fixed for applying for discharge. This course, if adopted, will compel the insolvent to be prompt. Moreover, it will not entail any hardship either on the debtor or on the creditors. The debtor cannot complain, for he can always, if he so chooses, apply for extension before the expiry of the original period. The creditors cannot complain, for the court has power, while annulling the adjudication, to make an order vesting the debtor's property in some person named for that purpose. If any proceedings have been instituted by the Receiver to set aside a transfer under section 53 or section 54 of the Act, they can continue notwithstanding the annulment (3), provided the debtor's property vests in the Receiver or some other person appointed by the court" (4).

Section 27 does not, however, apply where the insolvent has applied within the prescribed time but has failed to appear at a subsequent hearing. The adjudication must be annulled under section 43 in such a case (5).

Who can apply for an extension of the period fixed for discharge.—From sections 27 and 43 read together it is clear that the party who can make the application for discharge is the debtor and no one else.

(1) (1921) 48 Cal. 481 : 48 I. A. 76 : 60 I. C. 274 : A. I. R. 1921 P. C. 80.

(2) (1916) 44 Cal. 535 : 44 I. A. 11 : 39 I. C. 788 : A. I. R. 1916 P. C. 64.

(3) *Jethaji Peraji Firm v. Krishnayya*, (1929) 52 Mad. 648 : A. I. R. 1930 Mad. 278 : 122 I. C. 351.

(4) *Mulla's Tagore Law Lectures*, 1930 edition, pages 233 and 234.

(5) *Barakam Bapuji Kumbi v. Manglya Adqu Teli*, A. I. R. 1937 Nag. 37.

It is equally clear that the court has power to extend the period and it may be so done not merely at the instance of the debtor but on the application of anybody interested. Section 27 merely requires that sufficient cause shall be shown, but it does not say that the debtor alone may apply for extension or shall show sufficient cause (1). An application to extend time for discharge is maintainable even at the instance of the creditor (2). The period may be extended by the court on its own motion (3).

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An application of the insolvent for discharge can also be an application for extension of time although it does not specifically ask for such extension (4).

Notice of application for extension.—It is desirable that notice should be given to an alienee, but failure to do so is immaterial in the absence of any prejudice caused to him (5).

Miscellaneous.—An insolvency petition was put in on the 8th January, 1920 and the petitioner was adjudicated insolvent on the 4th June, 1920. Meanwhile Act 5 of 1920 had come into force on the 25th February, 1920. At the time of adjudication the court fixed one year as the period within which he should apply for discharge. It was contended in appeal that as the petition was filed under the old Act the petitioner obtained a vested right to an unconditional order of discharge and the court had no jurisdiction to impose a condition that discharge must be applied for within one year under section 27 of the new Act. It was held that by the mere filing of a petition under the old Act the petitioner did not acquire a vested right to a particular kind of order which cannot be affected by the new Act. The nature of order to be passed is a matter of mere procedure (6). There is no authority for ruling that in spite of the passing of the Act 5 of 1920, proceedings on petition filed under Act 3 of 1907 should continue to be dealt with under the provisions of the old Act (7).

Appeal.—An appeal lies against an order of adjudication under this section (8). An appeal lies to the High Court from an appellate order of the District Judge upholding the order of the trial court passed under section 27 of the Act (9). No appeal lies when the application

(1) *Jethaji Peraji Firm v. Krishnayya*, 122 I. C. 351 : 52 Mad. 648 : 1929 M. W. N. 489 : A. I. R. 1930 Mad. 278, *per* Venkatasubbarao, J.

(2) *K. K. S. A. R. A. Chettiar v. Maung Myat Tha*, 100 I. C. 921 : A. I. R. 1927 Rang. 136; *Suppiah Mooppanar v. Mallappa Chetty*, 124 I. C. 219 : A. I. R. 1930 Mad. 342 (1); *Ganpat v. Hari Gir*, 113 I. C. 357 : A. I. R. 1929 Nag. 11.

(3) *Rup Singh v. Official Receiver Jhang*, 107 I. C. 394 : A. I. R. 1928 Lah. 82 : 10 Lah. 357.

(4) *Sohna Ram v. Tara Chand*, 117 I. C. 87 : A. I. R. 1929 Lah. 399; *Gopal Ram v. Magni Ram*, A. I. R. 1928 Patna 338 : 7 Patna 375 : 107 I. C. 830; *Chettyar v. Ko Po Thit*, A. I. R. 1931 Rang. 27 : 8 Rang. 506 : 128 I. C. 841.

(5) *Suppiah Mooppanar v. Mullappa Chetty*, 124 I. C. 219 : A. I. R. 1930 Mad. 342.

(6) *K. P. Perachan v. P. P. Kuttiali*, 91 I. C. 144 : A. I. R. 1926 Mad. 123.

(7) *S. Ranghiah Chettiar v. Annaswamy Alwar Ayyangar*, A. I. R. 1924 Mad. 368 : 79 I. C. 408.

(8) S. 75, Schedule 1.

(9) *Kallukutt Parambath Perachan v. Kuttiali*, 49 M. L. J. 595 : A. I. R. 1926 Mad. 123.

- S. 28.** for extension of the period of discharge fixed by the order of adjudication is rejected (1) or granted (2).

28. (1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

Effect of an order of adjudication.

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

(3) For the purposes of sub-section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent.

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of sub-section (2) shall apply in respect thereof.

(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

(6) Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal

(1) In the matter of Ganga Prasad, 89 I. C. 959 : A. I. R. 1926 Oudh 186 (1).

(2) Sambamurthi v. Ramakrishna, 52 Mad. 337 : 114 I. C. 847 : A. I. R. 1929 Mad. 43.

with his security, in the same manner as he would **S. 23.** have been entitled to realize or deal with it if this section had not been passed.

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

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History.—The corresponding section of the Act 3 of 1907 is section 16. Sub-sections 3, 4, 5 and 6 of S. 16, P. I. A., 1907, are the same as sub-sections 3, 4, 6 and 7 of the present section. Sub-sections 1 and 2 of the present Act are new. S. 16 (1), P. I. A., 1907, is now replaced by section 25. Sub-section 2 of S. 16, P. I. A., 1907 runs as follows:—

“On the making of an order of adjudication—

(a) the whole of the property of the insolvent, save in so far as it includes such particulars (not being his books of account) as are exempted, by the Code of Civil Procedure, or by any other enactment for the time being in force, from liability to attachment and sale in execution of a decree, shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and

(b) The insolvent, if in prison for debt, shall be released ;

and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court, and on such terms as the Court may impose.”

Sub-section 2 (a) has now been split up and the property which is exempt from vesting is now specified in sub-section 5 of the present section. Excepting that property the whole of the property of the insolvent, now under sub-section 2, as it did under sub-section 2 (a) of section 16, P. I. A., 1907, vests in the receiver. Clause (b) of sub-section 2, section 16, P. I. A., 1907, is omitted and is replaced in the present Act by section 31. For the history of this clause and the reasons which led to its repeal, see commentary under that section. The words “or person of the insolvent” occurring in the second paragraph of sub-section 2 have also been omitted. For that, see *infra* under the present section and also commentary under section 31. Sub-section 7 of the old Act is made into a separate section, being section 30 of the present Act. For that, see commentary under that section. Under the Act 3 of 1907, there was a provision for entertaining and accepting proposals of composition or schemes of arrangement before the order of adjudication. These provisions, then contained in section 16 (1), have now been omitted and under the present Act a proposal for composition or scheme of arrangement can be made only after an order of adjudication and not before that.

Analogous law.—The relevant provisions of the Presidency-towns Insolvency Act corresponding to the present section are contained in sections 51 and 52. By section 51, it has been provided that the title of the Official Assignee on adjudication shall relate back to and commence at the time of the commission of the act of insolvency on which an order of adjudication is made against him or (b) if the insolvent is proved to have committed more acts of insolvency than one the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. By sub-section 7 of the present Act, the title of the receiver relates back to the date of the presentation of the petition under the Provincial Insolvency Act and not to the first available act of bankruptcy as it is under the Presidency-towns Insolvency Act. S. 52, Pt. I. A., stands as follows:—

1. “The property of the insolvent divisible amongst his creditors, and

in this act referred to as the property of the insolvent, shall not comprise the following particulars, namely :—

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(a) property held by the insolvent on trust for any other person ;

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding three hundred rupees in the whole.

2. Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely :—

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolved on him before his discharge ;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ; and

(c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof :

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c) ;

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods."

The Presidency-towns Insolvency Act also contains a definition of "property" in section 2 (e), which is the same as the definition given in section 2 (d) of the present Act.

The doctrine of "relation back" under English law was contained in section 43, B.A. of 1883, and is now contained in section 37 of the Act of 1914. The description of the insolvent's property divisible among his creditors was contained in section 144 (b) of 1883 and is now contained in section 38. Both these sections are almost the same as those existing in the Presidency-towns Insolvency Act and the differences between them need not be considered for our purposes. It is also provided by section 17, Pt. I. A. and section 18 (1), B. A. of 1914, that on the making of an order for adjudication the property of the debtor shall become divisible amongst his creditors and shall vest in a trustee. The definition of the word 'property' as given in section 167 of the B. A. of 1914 includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere ; also obligations, easements, and every description of estate, interest, and profit, present and future, vested or contingent, arising out of or incident to property as above defined.

The Provincial Insolvency Act does not describe in express words as to what property shall be divisible amongst his creditors. The use of the word 'property' in section 28, has, however, been taken to include only that property which is divisible amongst the creditors and which vests in the receiver for the purpose and not any other property. The

- S. 28** word 'property' has a definite legal meaning attached to it in the science
(2). of jurisprudence.

We shall consider the main points of difference in this respect between the Provincial Act on the one hand and the Presidency-town Insolvency Act and the English Acts on the other, in their proper places. The doctrine of "relation back" is considered under sub-section 7. The law as to after acquired property is embodied in sub-section 4 and it is under that sub-section that the difference between the different Acts will be considered. Similar is the case with the doctrine of ownership which is to be found in sub-section (3).

Sub-section (1).—This sub-section is new. Under the Act 3 of 1907 the duties of the debtor, both before and after the making of an order of adjudication, were prescribed by section 43 (1). As the section stood it was anomalous that the debtor should be called upon to aid in the realisation of the property before the order of adjudication. Under the present Act the duties of the debtor before the order of adjudication and after the order of the adjudication are separately defined in sections 22 and 28 (1). It is the debtor's paramount duty to help the receiver in getting in and collecting all his dues and assets and to place his assets unreservedly at the disposal of the receiver so that his creditors may get, as much as possible, their dues out of the same (1). And this duty of assistance exists both before and after discharge (2). Failure to perform the duties imposed on the debtor by the Act, if wilful, is punishable under section 69 of the Act.

Sub-section 2. Scope.—Sub-section 2 makes provision for making the two objects of all bankruptcy proceedings effective. The first part makes the property of the insolvent available for distribution and the second part bars the rights of creditors to realise their debts in any other way except by coming and proving in insolvency. We shall consider these two parts separately. We proceed to consider the first part which provides for the vesting of the insolvent's property in the receiver, or the court, till a receiver is appointed (3).

Sub-section (2), First part.—The property of the insolvent may be divided into two classes. Firstly, property which vests in the receiver and is divisible among the creditors of the debtor; and secondly, property which does not vest in the receiver and is not so divisible. Along with the other two heads we will also consider the general rules to which the vesting of the property is subject.

Property divisible amongst the creditors.—Broadly speaking, the bankrupt's estate consists of every beneficial interest which the bankrupt has (4). His entire *universitas juris* is by an adjudication taken from him and given to the trustee for his creditors he steps into his shoes and takes a title no better and no worse than the bankrupt, and who, further, becomes the owner of everything which the bankrupt acquires between the adjudication and the moment when the order for his discharge becomes effective. Not only the property which in the proper sense of

(1) In *Re Cowasji Polkerji*, 13 Bom. 144.

(2) *Shadan Chandra Bhandari v. Sewnarain* (Golab Rai, 147 I. C. 191 : 60 Cal. 936 : A. I. R. 1933 Cal. 699).

(3) *Rangappa Gangappa v. Ghanshyam Madhas Tapi*, A. I. R. 1937 Nag. 193.

(4) *Smith v. Coffin*, 2 H. Bl. 444.

the word belongs to the bankrupt vests in the receiver but also property which does not belong to him is also made available because of the bankruptcy laws. Thus property which is claimed by virtue of the doctrine of relation back (1), by the doctrine of reputed ownership (2), or by avoiding transfers under sections 53 and 54 of the Act (3) is also available for distribution among the creditors.

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(2).

Under English law, vested or contingent interests of the bankrupt vest in the receiver. It is often a matter of great difficulty as to what a contingent interest is as distinguished from a mere possibility of interest. A mere possibility of interest will not pass to the trustee, such as the chance of an heir-apparent succeeding to an estate, the chance of a person obtaining a legacy on the death of a relative (4) or the chance of a reversioner to succeed on the death of a Hindu widow (5). Where, however, the possibility is coupled with an interest (6), or where the right accrues during the continuance of the insolvency it passes to the receiver (7). It has also been held that a gift of a share in his residuary estate to a son who died, during the life of the testator, an undischarged bankrupt intestate and without leaving issue passes to the trustee on the son's bankruptcy (8). A vested life-interest under the will in a definite fund or income of property falls under S. 6, P-t. I. A. and vests in the receiver (9). Patents and trade marks (10), copy-rights (11), things in action (12) (just as debts due to the insolvent), share in partnership and goodwill of the insolvent's business are all included in property and vest in the receiver. Goodwill which is personal to the insolvent as in the case of a professional man does not, however, pass to the official assignee (13). The general rule in regard to the sale of the goodwill of the business is that the vendor of a goodwill may not destroy what he has sold and he will be restrained from soliciting customers (14).

(1) See section 28, sub-section 7 *infra*.

(2) See section 28, sub-section 3 *infra*.

(3) See sections 53 and 54 *infra*.

(4) *Carleton v. Leighton*, 1805, 3 Mer. 667 : 36 E. R. 225 ; *Re Wizard's Trusts*, 1866, L. R. 1 Ch. App. 588 ; *Exp. Dever*, 18 Q. B. D. 660 ; *Gibbons v. Eyden*, L. R. 7 Eq. 371.

(5) *Babu Anaji v. Ratnoji*, 1896, 21 Bom. 319. Also see Hindu Law by Mulla.

(6) *Davidson v. Chalmers*, 1864, 33 L. J. Ch. 622.

(7) *Re Wizard's Trusts*, L. R. 1 Ch. 588 ; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61 ; *Re Rush*, 1922, 1 Ch. 302.

(8) *Re Pearson*, 1920, 1 Ch. 247.

(9) *Khemchand Metharam v. Hemandas Ramrakhamal*, A. I. R. 1937 Sind 306.

(10) See *Hesse v. Stevenson*, 1803, 3 Bos. and P. 565 : 127 E. R. 305 (Patents) ; *Re Graydon*, 1896, 1 C. B. 417 (Royalties).

(11) Sec. 60, B. A., 1914.

(12) *Jaffer Mehar Ali v. Budge-Budge Jute Mills Co.*, 1907, 34 Cal. 289 ; *Onkarsa v. Bridichand*, 73 I. C. 1037 : A. I. R. 1923 Nag. 290.

(13) *Walker v. Mottram*, 1881, 19 Ch. D. 355.

(14) *Trego v. Hunt*, 1896, A. C. 7. Also see the Indian Contract Act, section.

- S. 28** This rule however does not apply to the sale of the bankrupt's business and goodwill by the receiver, as such a sale is not a voluntary sale by the bankrupt and he cannot be restrained from *bona fide* setting up a new business and soliciting his former customers (1).
- (2).**

Vesting of Joint Family Property.—The institution of joint family is peculiar to Indian Law. The incidents of the ownership of property owned by the joint family, the relations of the member of the family *inter se*, the liability of the members and the family property for the payment of the debts due from the family are all governed by special rules of Hindu law. The subject which we have to consider here is the extent to which joint family property is affected by the adjudication of a member of the family and the receiver's power to deal with it. The vesting of property also depends upon the fact as to whether it is the father-manager or other member-manager or any other ordinary member of the family who is adjudicated insolvent. We proceed to consider the vesting of property of joint Hindu family on the insolvency of these persons.

Insolvency of Father.—Where the joint Hindu family consists of of a father and his sons and the father is adjudged insolvent what vests in the receiver consists of the separate property of the father, his undivided share in the joint family property and his power of disposing of the interests of his sons in such property for payment of his own debts to the extent it is recognised in Hindu law. The leading Indian case is the Privy Council case of *Sat Narain v. Behari Lal* (2). That was a case where the father had been adjudged insolvent under the Presidency-towns Insolvency Act. The suit out of which the case arose was one for possession of the house by pre-emption brought by the sons of one Sri Krishan Das who had been, before the institution of the suit, adjudged insolvent by an order of the High Court of Bombay under the Presidency-towns Insolvency Act. It was not disputed that the plaintiff and the insolvent constituted a joint Hindu family and that the house, title to which was alleged by the sons to be the basis of their right of pre-emption, was a portion of the joint family property. The District Judge gave the plaintiffs a decree. On an appeal to the High Court of Judicature at Lahore the appeal was accepted and the suit dismissed on the ground that the adjudication of the father had the effect of vesting the whole family property, including the son's share therein, in the receiver and that the plaintiffs had no interest left in the property, on which a claim for pre-emption could be founded. In the High Court, the matter was decided by a Full Bench consisting of three judges whose judgment is reported as *Behari Lal v. Sat Narain* (3). In that case the judges considered the case-law at length and Sir Shadi Lal, who delivered the judgment of the Full Bench, followed, though not without much hesitation, the prevalent view. Before the Privy Council case referred to above it was held in many cases that on the insolvency of a Hindu father governed by the Mitakshara law his son's interest as well as his own interest in the joint family estate

(1) *Walker v. Mottram*, 1881, 19 Ch. D. 355; *Green and Sons v. Morris*, 1914, 1 Ch. 562. (Sale by a trustee under a deed of assignment).

(2) A. I. R. 1925 P. C. 18: 84 I. C. 883: 6 Lah. 1: 52 I. A. 22.

(3) A. I. R. 1923 Lah. 1 (F. B.): 3 Lah. 329: 69 I. C. 486.

vested in the receiver (1). A contrary view to the effect that the whole of the joint family property does not vest in the receiver was also taken in a few cases (2).

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Their Lordships of the Privy Council in *Sat Narain v. Behari Lal* (3) considered at length section 52 and section 2 (Definition of property) of Presidency-towns Insolvency Act, and held that a father's power of disposal over the son's share in the joint family property comes under S. 52, Pt. I. A., and vests in the receiver and that the share of the son itself in the property does not so vest. As regards S. 2, Pt. I. A., it was remarked that it contemplates an absolute and unconditional power of disposal, and that as the father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property it does not most probably fall within the definition of property given in that section. So far as the law under the Presidency-towns Insolvency Act was concerned, it was settled by the above judgment of the Privy Council. The Provincial Insolvency Act does not contain any section corresponding to S. 52, Pt. I. A., but the definition of property given in section 2 (a) (d), is in the same terms as that given in S. 2, Pt. I. A. Notwithstanding the absence of a section similar to S. 52, Pt. I. A., in the Provincial Insolvency Act, it has been consistently held, though not on quite the same grounds, that the law laid down by the Privy Council in *Sat Narain v. Behari Lal* (4), also applies to an adjudication under the Provincial Insolvency Act (5). In some of

(1) *Behari Lal v. Sat Narain*, A. I. R. 1923 Lah. 1 (F. B.); *Rallaram v. Official Receiver, Gujranwala*, 69 I. C. 729; A. I. R. 1924 Lah. 297 (1); *Kuppu Swami Goundan v. Miri Muthu Goundan*, 82 I. C. 438; A. I. R. 1925 Mad. 52, (Overruled in *Balavenkatasutharama Chettiar v. Official Receiver, Tanjore*, A. I. R. 1926 Mad. 994 (F. B.); 49 Mad. 849; 97 I. C. 825; *Bawan v. O. M. Chhene*, 64 I. C. 976; 44 All. 316; A. I. R. 1922 All. 79; *Sitaram v. Beniprasad*, 84 I. C. 790; 47 All. 263; A. I. R. 1925 All. 221; *Harmukhrai Munnalal v. Rudha Mohan*, A. I. R. 1920 Lah. 269; 158 P. R. 1919; 54 I. C. 931; *Amolak Chand v. Mansukhrai*, 85 I. C. 88; 3 Patna 857; A. I. R. 1925 Patna 127; *Fajirchand Motichand v. Hurruckchand* 1883, 7 Bom. 483; *Nunna Brahmayya Setty v. Chidarboyina*, 1903, 26 Mad. 214; *Chellaram v. Official Receiver*, 75 I. C. 497; A. I. R. 1923 Sind. 20; *Narasimhulu v. Sankaram*, 85 I. C. 439; A. I. R. 1925 Mad. 249; *Chairman, District Board Monghyr v. Sheodatt Singh*, 98 I. C. 364; 5 Patna 476; A. I. R. 1925 Patna 438.

(2) *Sant Prasad Singh v. Sheodutsingh*, 77 I. C. 589; 2 Patna 724; A. I. R. 1924 Patna 259; *Anantsingh v. Kalkasingh*, A. I. R. 1918 Od. 303; 48 I. C. 526; *Shivcharan v. Sheikh Mohammad Ismail*, 2 L. L. J. 401; A. I. R. 1920 Lah. 498.

(3) A. I. R. 1925 P. C. 18; 84 I. C. 883; 52 I. A. 22; 6 Lah. 1.

(4) A. I. R. 1925 P. C. 18; 52 I. A. 22; 84 I. C. 883; 6 Lah. 1.

(5) *Subramania Aiyar v. Krishna Aiyar*, 102 I. C. 266; A. I. R. 1927 Mad. 701; *Balavenkata Seetharama v. Official Receiver Tanjore*, 97 I. C. 825; 49 Mad. 849; A. I. R. 1926 Mad. 994; *Baji Rao v. Daulat Rao*, A. I. R. 1930 Nag. 215; *Haridas v. Lallubhoy*, 55 Bom. 110; 129 I. C. 153; A. I. R. 1931 Bom. 50; *Jansa Gansa Kalal v. Ram Krishna*, A. I. R. 1937 Nag. 31; *Piare Bai v. Tulsi Das Tarlochanmal*, 100 I. C. 110; A. I. R. 1927 Lah. 152; *Lakshmina Nan Chettiar v. Srinivasam Aiyangar*, A. I. R. 1937 Mad. 131; *Lalji v. Bansi Dhar*, A. I. R. 1933 Nag. 73; *Shankarnarain v. Official Receiver of Kanara*, 139 I. C. 838; A. I. R. 1933 Mad. 73; *Bhola Prasad v. Ram Kumar Marwari*, 11 Patna 399; A. I. R. 1932 Patna 231; 139 I. C. 13; *Om Prakash v. Motiram*, 94 I. C. 175; 48 All. 400; A. I. R. 1926 All. 447; *Allahabad Bank, Bareilly v. Bhagwandas*, 92 I. C. 309; 48 All. 343; A. I. R. 1926 All. 262.

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these cases the ground of the decision is that S. 28, P. I. A. by itself, is wide enough to include the father's power of disposal and to make it vest in the receiver, and that it is not necessary to pray in and the definition of 'property' in section 2 (b) for this purpose (1). In some other cases it has been held that the father's power of disposal over his son's interest in the family property comes within the scope of the definition of property given in section 2 (1) (a), and that the Privy Council case did not decide to the contrary (2).

It may now be taken as settled law that it is not the interest of the sons in the property but only the father's power of disposal over the sons' interest that vests in the receiver (3). This power of the father is a conditional one and can be exercised only when certain other conditions are existing and then also subject to certain limitations imposed by Hindu law. Upon general principles of Hindu law governing the rights of a father, his adjudication has only the effect of replacing him by the official receiver. He may exercise all the powers which the father has. The leading Indian case on this point is *Sat Narain v. Sri Krishna Das* (2). This case arose out of the same insolvency, out of which the previous leading Privy Council case arose. Their Lordships of the Privy Council held that the father's power of sale for his debts exists only so long as the joint Hindu family property is undivided, that the capacity of the official assignee must also be similarly limited, and that the official assignee can exercise the power of sale subject to the same limitations. Even before the above pronouncement of Their Lordships of the Privy Council, it was held almost unanimously by the Indian High Courts both under the Presidency Towns and the Provincial Insolvency Acts that as the son's share is liable to be attached and sold in execution of a money decree obtained against the father alone and as the father himself can alienate the son's interest for the payment of his own debts not incurred for illegal and immoral purposes, the receiver can also in insolvency proceedings proceed to sell the son's share in the property as well (5). Not only he can sell the son's share, but he may also lease the whole property including the son's share (6). Similarly he may claim all the rights over

(1) *Subramania Aiyar v. Krishna Aiyar supra*; *Balavenkata Seetharamu v. Official Receiver Tanjore supra*.

(2) *Baji Rao v. Daulat Rao*, A. I. R. 1930 Nag. 215; 128 I. C. 404; *Jansa Gansa Kalal v. Ram Krishna*, A. I. R. 1937 Nag. 31; *Haridas v. Lallu Bhoj* 55 Bom. 110; 129 I. C. 153; A. I. R. 1931 Bom. 50.

(3) *Alagappa Chettiar v. Kannappa Chettiar*, A. I. R. 1937 Mad. 932; *Bishwanath Sao v. Official Receiver*, A. I. R. 1937 Pat. 185, overruling *Nilkantha Narayan v. Debendra Nath Ray*, A. I. R. 1936 Patna 115.

(4) A. I. R. 1936 P. C. 277; 17 Lah. 644; 161 I. C. 6.

(5) *Siddheshwar Nath v. Beokali Din*, A. I. R. 1934 Oudh 1; 147 I. C. 642; 9 Luck. 304; *Haridas v. Lalubhai*, 55 Bom. 110; 129 I. C. 153; A. I. R. 1931 Bom. 50; *Ram Ghulam v. Kailash Narain*, 52 All. 493; 127 I. C. 584; A. I. R. 1931 All. 59 (1); *Anand Prakash Naraindas v. Dorilal*, 53 All. 239; A. I. R. 1931 All. 162; *Official Receiver Lahore v. Chimanlal*, 123 I. C. 286; A. I. R. 1930 Lah. 645; *Bhagwandas v. Lakhshimichand*, A. I. R. 1935 All. 643; 155 I. C. 661. (In this case it was also held that attachment of the son's share is not necessary; it is enough if it has been seized); *Sat Narain v. Sri Krishna Das*, 93 I. C. 612; 7 Lah. 376; A. I. R. 1926 Lah. 264, confirmed on appeal in *Sat Narain v. Sri Krishnadas*, A. I. R. 1936 P. C. 277 *supra*.

(6) *Shankar Narain v. Official Receiver of South Kanara*, 139 I. C. 888; A. I. R. 1933 Mad. 73.

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the property as joint possession, except such rights as are in their nature personal to a member of the family such as the right to live in the family house or to share in the family meals (1). Similarly, if the sons' shares have been alienated and the alienation falls under section 53 or 54, the receiver may move the insolvency court to annul the alienation even in respect of the son's share (2). As a father has no authority to eject his sons from the property so the receiver cannot claim exclusive possession of the property (3). In another case it has, however, been held that where the receiver has sold the whole property including the sons' shares and the purchaser is obstructed by the sons the insolvency court has jurisdiction to oust the sons from the property and place the purchaser in possession (4).

Limitations to which the power is subject.—As already stated the power of the father to sell the shares of the sons passes to the official receiver but the exercise of that power by him is subject to the same qualifications as it is in the father's hands. Thus if the share of the son in the property was attached before insolvency in execution of a decree the receiver cannot sell afterwards the son's share and defeat the rights of the attaching creditor (5). Again, the father can sell the family property, including the shares of his son, only so long as the family is undivided. The institution of a suit for partition by the sons against their father after the latter's insolvency and before the sale effects a division in status of the family and the father's power of disposal ceases from that date (6). Such a suit can be continued and maintained by the sons and they are *prima facie* entitled to a decree for partition though in effecting it regard will be had to debts which are payable by the father and are also binding on the sons. Where the debts for which the official receiver has sold the property are neither illegal nor immoral, regard will be had to the equities of the purchaser from the receiver, to whom they will be allotted on partition if there are no other intervening superior equities (7). Where a sale deed executed by the official receiver conveyed

(1) Official Receiver of Madras v. Ramchandra Iyer, 68 I. C. 898 : 46 Mad. 54 : A. I. R. 1923 Mad. 55.

(2) Hirralal Champalal v. Fattchchand Parmapand, A. I. R. 1934 Nag. 271 : 152 I. C. 1026.

(3) Sitaram v. Receiver of the estate of Ram Prasad, 137 I. C. 785 : A. I. R. 1932 All. 353.

(4) Subbarayudu v. Satya Naidam, 143 I. C. 833 : A. I. R. 1933 Mad. 609 (point not actually decided).

(5) Gopal Krishnayya v. Gopalan, 111 I. C. 505 : 51 Mad. 342 : A. I. R. 1928 Mad. 4791 ; Official Receiver, Coimbatore v. Arunachalan Chettiar, 130 I. C. 479 : A. I. R. 1931 Mad. 118 ; Official Receiver, Coimbatore v. Arunachalan Chettiar (L. P. Appeal), A. I. R. 1934 Mad. 217 : 148 I. C. 787 ; Bondalapati Kanyak v. Mardava Venkataramayya, A. I. R. 1936 Mad. 698 : 164 I. C. 853 ; Official Receiver, East Godavari Raja Mundry v. Imperial Bank of India Rajamundry, A. I. R. 1936 Mad. 193 : 59 Mad. 296 : 161 I. C. 726 ; Palipati Subbarao v. The Official Receiver (Guntur, A. I. R. 1934 Mad. 427 ; Venkatarama Sastriar v. Official Receiver, A. I. R. 1935 Mad. 255 (facts are peculiar) ; Kamla Bala Dasi v. Surindra Nath Ganguli, 154 I. C. 449 : A. I. R. 1937 Cal. 517.

(6) Venkatarayan v. Kesawan Pattar, 114 I. C. 225 : A. I. R. 1929 Mad. 778 ; Official Assignee Madras v. Ram Chandra, 112 I. C. 541 : 51 Mad. 417 : A. I. R. 1928 Mad. 735.

(7) Venkatarayan v. Keswan Pattar, 114 I. C. 225 : A. I. R. 1929 Mad. 778.

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only the right, title and interest of the insolvent father in a joint Hindu family and the minor son had obtained in a suit for partition a decree before such sale, it was held that the share of the son in property was not sold, the ground of the decision being that after the partition decree the receiver could not sell the son's share (1). The receiver's power to sell the son's share certainly ceases as soon as a partition suit is instituted, but it does not mean that the receiver cannot make available the son's share for payment of the father's debts by taking proper proceedings (2). Such a power however does not terminate where the insolvent dies after his adjudication (3). It is submitted, with great respect, that this case is of doubtful authority in view of the subsequent Privy Council's ruling in *Sat Narain v. Sri Krishna Das* (4).

The vesting of the father's power of disposal in the receiver does not bar a suit by a creditor against the other members of the family, even if the liability of the other members is based on a document executed by the managing member himself. Thus where after the adjudication of the managing member of a joint Hindu family, a creditor filed a suit on a promissory note executed by the managing member and the suit was dismissed against the insolvent and the official receiver but decreed against the other members of the joint family, it was held that the suit was rightfully decreed as it was only directed against the shares of the other members (5).

For detailed treatment on the subject of a father's power of disposal over the son's interest, the reader may refer to Mulla's Hindu Law, 8th Edition, Chapter XIV, or any other standard work on Hindu Law.

Insolvency of manager other than the father.—On the insolvency of the manager of a joint Hindu family, when he is not the father, what vests in the receiver is the manager's power to dispose of such shares to satisfy the just and proper debts incurred by him on behalf of the joint family (6). The only difference between the insolvency of the manager of the joint Hindu family when he is the father and when he is only another adult member is that the powers of disposal in the latter case are more restricted. Otherwise the same principles which govern the vesting of the joint property on the insolvency of a father-manager apply to the case of insolvency of any other managing member of the family.

The insolvency of a member who is not the manager.—The insolvent's undivided share in the property of the joint family of which he is a member is property within the meaning of the Insolvency Act and

(1) *Nachi Muthu Chettiar v. Ramakkal*, A. I. R. 1933 Mad. 475: 147 I. C. 494.

(2) *Official Assignee, Madras v. Ram Chandra*, 112 I. C. 541: 51 Mad. 417: A. I. R. 1928 Mad. 735.

(3) *Gori Shanker v. Bhasheshwar Nath Goela*, 135 I. C. 217: 13 Lah. 461: A. I. R. 1932 Lah. 151.

(4) A. I. R. 1936 P. C. 277: 63 I. A. 384: 164 I. C. 6: 17 Lah. 644.

(5) *Chinna Veeriah v. Gurivi Reddi*, 148 I. C. 831: A. I. R. 1934 Mad. 223.

(6) *Kanhaiya Lal Marwari v. Dablia*, 143 I. C. 769: A. I. R. 1933 Nag. 150.; *Official receiver, Anantapur v. Ramachandrappa*, 114 I. C. 315: 25 Mad. 246: A. I. R. 1929 Mad. 166; *Varadarajan v. Srinivasa Rao*, 75 I. C. 471: A. I. R. 1924 Mad. 792.

it vests in the receiver (1). The receiver can sue for partition of the share of the insolvent vested in him (2). He can also sell the right, title and interest of the insolvent co-parcener in the joint family property without getting the actual share determined, the reason being that it can also be done in execution of a decree (3). As the member's share alone vests in the receiver a creditor's suit against the other members of the family is not barred in the ordinary civil courts (4). Again the court has no power to annul a sale in respect of the shares of members of the family other than the insolvent in a proceeding under S. 36, P. I. A. 1907, (S. 53 P. I. A. 1920) (5). S. 28
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It is true that the share of a co-parcener vests in the receiver, but he does not cease to be a member of a joint Hindu family and still continues as a member thereof. But once the share of the insolvent is divested of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment. Under S. 37, P. I. A. it reverts to the insolvent in his individual capacity so that if he is not alive on the date of reversion it will go to his heir-at-law and can be made available for the debts of the deceased (6).

Property of the insolvent which is not divisible amongst his creditors.—We have seen that the general rule is that all that the insolvent has at the beginning of, or gets during the continuance of his insolvency, subject to some legal and equitable limitations and to certain limitations imposed by honesty (however little they may have hampered the insolvent), vests in the trustee. The subject of vesting of property acquired by the insolvent during the continuance of his insolvency (which is technically called after-acquired property) will be considered at length under sub-section 4. The subject of vesting of property which the insolvent has at the beginning of his insolvency, *i. e.* on the date of the presentation of the petition for insolvency has been dealt with above. The rules above stated are, however, subject to many exceptions which we proceed to consider under the heading given above. The following kinds of property are not divisible amongst the creditors of the insolvent :—

- (a) Property held by the bankrupt on trust or in a fiduciary capacity.
- (b) Certain rights, which are, by reason of the nature of the rights themselves defeasible on bankruptcy or modified by insolvency.
- (c) Property which is not liable to be attached and sold in execution of a decree under the Code of Civil Procedure, 1908, or any other enactment for the time being in force.

(1) *Lal Bahadur v. Paspas Prasad*, 74 I.C. 301 : A.I.R. 1923 Oudh 154 : 26 O. C. 384, *Nathusa Pausa v. Mahadeo*, 144 I. C. 117 : A. I. R. 1933 Nag 324.

(2) *Lal Bahadur v. Paspas Prasad*, 74 I. C. 301 : A. I. R. 1923 Oudh. 154 : 26 O. C. 384.

(3) *Lathumal v. Dinanath*, 146 I. C. 840 : 34 P. L. R. 1032 : A. I. R. 1933 Lah. 651.

(4) *Asa Nand v. Bishan Singh*, 131 I. C. 345 : A. I. R. 1931 Lah. 125 ; *Nathusa Pasusa v. Mahadeo*, 144 I. C. 117 : A. I. R. 1933 Nag 324.

(5) *Palaniappa Mudali v. The Official Receiver of Trichinopoly*, 35 I. C. 610 : A. I. R. 1917 Mad. 414 (Compare *Hira Lal Champa Lal v. Fattah Chand Parmanand*, A. I. R. 1934 Nag. 271 : 152 I. C. 1026, where the father was the insolvent).

(6) *Lakshmana Chettiar v. Sri Nivasa Aiyengar*, A. I. R. 1937 Mad. 131.

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(d) By the common law of Britain, as followed in India :—

(i) Such part of the insolvent's personal property as is necessary for his maintenance; and

(ii) certain rights of action.

(e) Rights which are by their nature not transferable.

Property held on trust or in fiduciary capacity Under the Presidency-towns Insolvency and the English Bankruptcy Acts, property held on trust is expressly excepted from vesting in the trustee by the Acts themselves (1). The Provincial Insolvency Act does not contain any such express provision but the law is the same, as that property has always been held not to pass to the representative of the creditors independently of any statutory provision to that effect (2). The word "trust" is not to be understood in the strict sense of the term but includes cases where property is held as executor or administrator (3), or in any fiduciary capacity (4) as bailee (5), factor or agent (6), solicitor (7), broker (8), auctioneer (9), cashier (10), or the like capacity.

Trusts may again be classified as follows :—

(i) Express trusts and trusts *virtute officii*;

(ii) Trusts created by the bankrupt on what was his own absolute property and

(iii) Trusts of agency in the subject matter of which the bankrupt has not the general, but only a special property.

Express trusts.—The subject of trusts is dealt with in the Indian Trusts Act, II of 1882. A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another or of another and the owner. The person who reposes or declares the confidence is called the author of the trust, the person who accepts the confidence is called the trustee; the person for whose benefit the confidence is accepted is called the beneficiary; the subject-matter of the trust is called the trust property or trust money. The beneficial interest or interest of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the instrument

(1) Sec. 52, Pt. I. A. 1909.; Sec. 38, B. A., 1914.

(2) See *Winch v. Keeley*, 1 T. R. 619, and *Copman v. Gallant*, 1 P. Wms. 314; *Banarasidas v. Bhagat Ram Chand*, A. I. R. 1934 Lahore 683 : 148 I. C. 550, *Hunter v. Rani Kaniz Abid*, A. I. R. 1935 P. C. 104; *Ramappa Naidu v. Lakshmana Chettiar*, 107 I. C. 786 : A. I. R. 1928 Mad 190.

(3) *Ludlow v. Browning*, (1708) 11 Mod. 138 : 88 E. R. 950; *Krishnam achariar v. Official Assignee of Madras*, 55 Mad. 455 : 137 I. C. 571 : A. I. R. 1932 Mad 256.

(4) In the matter of *Syed Kazim*, 1927, 5 Rang. 73 : 102 I. C. 389 : A. I. R. 1927 Rang. 140, set aside on appeal, on facts, in *U. Po Hnyin v. Official Assignee*, 117 I. C. 51 : 6 Rang 689 : A. I. R. 1929 Rang 59; *New Zealand and Australian Land Co., v. Watson*, 1881, 7 Q. B. D. 374, (383).

(5) *Re Hallett's estate*, 1879, 13 Ch. D. 696, (710-711); *Moonrumugam Kondan Asari v. Chockalingam Asari*, A. I. R. 1930 Mad 913 (F. B.) : 129 I. C. 33.

(6) *Taylor v. Plumer*, 1815, 3 M and S. 562 : 145 E. R. 721.

(7) *Re Hallett's estate*, 1879, 13 Ch. D. 696.

(8) *Ex parte Cooke*, 1876, 4 Ch. D. 123.

(9) *Re Cotton*, 1913, 108 L. T. 310.

(10) *Re Hulton*, 1891, 8 Mor 69.

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of trust (1). Where the legal interest or general and absolute property is vested in the bankrupt for the purpose of the trust and where the trust itself is the origin of the legal ownership, not even the bare legal interest passes to the trustee (2). If the bankrupt has a beneficial interest in the trust property, it passes to his trustee in bankruptcy to form part of his divisible estate (3). Thus the trustee's right to be indemnified out of the trust property passes to his trustee in bankruptcy, but the latter may not out of that right make a profit for the bankrupt's estate and may only use the right of indemnity for the purpose of bringing about payment to the principal creditor of the claim against which he, the trustee, is indemnified (4). With reference to all trust property, it is to be noted that it is only property generally that can be earmarked as such that is excepted from vesting in the receiver. The Courts are however very acute in distinguishing trust funds and will trace them, however much their character or nature may be altered, provided that that which is found in the possession of the bankrupt trustee can be clearly identified as the fruit of the trust property (5). It is not necessary that the trust money should be capable of being identified as a part either of the physical mass of money or of a balance standing to the credit of the defaulting trustee, where the proceeds of the trust property are deposited by the trustee in his general account. The leading English case on the subject of following trust money or money which is the proceeds of trust property is *Re Hallett's Estate*, 13 Ch. D. 696. Section 63 and section 66 of the Indian Trusts Act are based on that case and they embody the general rules about following trust property into the hands of a third person or following the proceeds of trust property where it has been converted wrongfully into money.

These sections may be quoted here with advantage.

"Section 63.—Where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property.

Section 66.—Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

Section 66 is subject to section 64 of that Act, but it is not necessary for our present purpose to consider its effect. Under section 66, it is important to observe that the right to follow the money or to claim a charge on the whole of that fund with which that money is mixed can only

(1) Sec. 3, Indian Trusts Act.

(2) *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582, *per* Jessel, M. R.; *Exp. Gennys, M. & McA.* 258.; *Exp. Painter*, 2 D. & C. 584; *Carvalho v. Burn*, 4 B. & Ad. 382; *Houghton v. Koenig*, 25 L. J. C. P. 218.

(3) *St. Thomas Hospital v. Richardson*, 1910, 1 K. B. 271, p. 277.

(4) *Gennings v. Mather*, 1902, 1 K. B. 1, (for the first part of the proposition); *Re Richardson*, 1911, 2 K. B. 705, (for the second part).

(5) *Exp. Sayers*, 5, Ves. 169; *Taylor v. Plumer*, 3 M. and S. 562; *Exp. Cooke*, 4 Ch. D. 123; *U. Po Hnyin v. Official Assignee*, 117 I. C. 5:16 Rang. 689; A. R. 1929 Rang. 59.

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arise when the inter-mixture of it is wrongful. "As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception, for all cases where it has been held that moneys mixed and confounded but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of a particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts. In other words that they were cases where the relationship of debtor and creditor has been constituted, instead of the relation either of trustee and *cestui que trust*, or principal or agent (1)." If a trustee pays trust-money into his private account in no way distinguishing or ear-marking them not only that the beneficiary will have a charge for it on the account but if he (the trustee) afterwards draws generally on the account for his private expenses, his drafts would primarily be ascribed to that portion of the fund which was in every sense his own, and he would in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right and if the acts could not in that respect be wholly justified, they would be deemed to be just to the utmost amount possible (2). This presumption that the bankrupt has expended his own moneys or property for his own purposes rather than trust moneys or property, may be regarded as an estoppel against the bankrupt which binds the trustee for his creditors. Where the agent of some brewers who was supplied with money by them for the purpose of purchasing barley to be converted on his premises into malt for his employers, in fact misappropriated the money so supplied to him and purchased barley and ready made malt on credit, and then became bankrupt, having a large quantity of such barley and malt in his possession, but a less quantity than he ought to have had if he had properly expended the money entrusted to him, it was held that as the agent could not have set up that he has purchased for himself and not for his employers similarly the trustee in bankruptcy could not set this up and deny the right of the employer to the barley and malt found on the premises (3). The presumption also prevails against the principle laid down in Clayton's case (4), which is that the moneys drawn out would be applied to the moneys paid in the order in which such moneys happened to have been paid in (5). As between the two *cestuis que trustent*, whose money the trustee has paid into this own banking account, the rule in Clayton's case applies so that the first sum paid in will be held to have first been drawn out (6). The presumption, however, does not extend into a presumption that after wrongfully drawing from the fund what by virtue of that presumption must be deemed to be trust money, the trustee in paying money into the fund must be deemed to be making good his defalcations. To illustrate, if A's account be hundred rupees in credit and he pays into it one thousand rupees held on trust for B, and on the following day draws out and spends

(1) *Re Hallett's estate*, 13 Ch. D. 696, per Jhesiger, L. J. P. 723.

(2) *Frith v. Cartland*, 34 L. J. Ch. 301; *Pennell v. Deffell*, 23 L. J. Ch. 115; *Re Hallett's estate*, 13 Ch. D. 696, 777; *Gibbert v. Gonard*, 54 L. J. Ch. 439; *Re Blakeway and Thomas*, 52 L. T. 630.

(3) *Harris v. Truman*, 9 Q. B. D. 264.

(4) 1 Mer 572.

(5) *Re Hallett's estate*, 13 Ch. D. 696, dissenting from and not following *Pennell v. Deffell* 23 L. J. Ch. 115 and *Brown v. Adams* L.R. 4 Ch. 764, where the contrary was held.

(6) *Re Stenning*, 1895, 2 Ch. 433.

for himself 1099 rupees, and the next day pays in two thousand rupees of his own monies, B's charge on the rupees two thousand and one is a charge for rupee one only (1). The bankrupt may have property vested in him in his capacity as executor, administrator, and trustee in bankruptcy. Such property does not pass to the bankrupt's assignee in bankruptcy (2).

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Trust property may be affected by the doctrine of reputed ownership.—For that see commentary under sub-section (3) of the section.

Trusts created by the bankrupt on what was his own absolute property—A similar rule prevails where the bankrupt does not acquire the legal ownership for purposes of the trust, but retaining the legal ownership has divested himself of all or part of his beneficial interest. If the bankrupt has become a bare trustee, the legal estate only will remain in the bankrupt and nothing will pass to the trustee in bankruptcy (3). But if any beneficial interest, whether ascertained or not, remains in the bankrupt the legal interest will pass to the trustee in bankruptcy subject to the trust (4).

Under this heading come what are called equitable assignments or specific appropriations. As to whether there has been an equitable assignment or the creation of an equitable interest by the bankrupt or whether particular goods or chattels have been specifically appropriated so as to create such an interest is essentially, though not always easy to determine, a question of fact depending upon the intention of the parties and the circumstances showing how far such intention has been carried out.

In considering whether there has been specific appropriation of any goods, property, money, debt or any other thing for a particular purpose, the following matters are relevant, namely ;—

1. Nature of the property.
2. In whose possession that property is at the time of the alleged appropriation ?
3. Whether that appropriation is revocable or when it becomes irrevocable.
4. Circumstances which indicate the fact of appropriation.

Again there is a difference between cases where there is an antecedent contract to appropriate and the appropriation is made in pursuance of that contract and those where there is no certain antecedent contract to appropriate.

When there is a contract to appropriate, charge, or hold in trust *specific* property or a specific debt or fund, the contract operates forthwith as an assignment in equity. It is immaterial as to the person in whose possession the property may be, as no notice, where it is in possession of the agent or debtor or trustee for the bankrupt, is necessary (5). Where

(1) See *Roscoe James, Ltd., v. Winder*, 1915, 1 Ch. 62. and *William's Bankruptcy Practice*, 14th Edition, pp. 243.

(2) *Ludlow v. Browning*, 11 mod 138 ;

(3) *Winch v. Keelev*, 1 T. R. 619 ; *Boddington v. Castelli*, 1 E. & B. 879.

(4) *Parnham v. Hurst*, 8 N. & W. 743 ; *Castelli v. Boddington*, 1 E. & B. 66 ; *Carvalho v. Burn*, 4 B. & Ad. 382.

(5) *Rodick v. Gandell*, 1 DeG M. & G. 763 ; *Burn v. Carvalho*, 4 Myl. & Cr. 690 ; *Alexander v. Steinhardt, Walker & Co.*, 1903, K. B. 201 ; *Palmer v. Carey*, (1926) A. C. 703.

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the property, debt or fund is not specific the bankrupt must, in order to constitute an assignment in equity, by overt act, specify the subject matter of the assignment in some manner as by posting an order to the debtor or agent (1). Where the property is in the possession of the bankrupt or his agent and he appropriates it in pursuance of an antecedent contract to appropriate, it is not necessary to give notice to the appropriatee of the appropriation as his case it will be assumed to that which is to his advantage (2). Whether there is an antecedent contract to appropriate or not is a question of fact. Such a contract must be distinguished from a mere representation of the bankrupt's means of paying off his debt specifying when a particular debt shall be paid. Where a person who was indebted to a bank agreed with the bank's manager to assign to the bank his interest in certain goods, then deposited with a third party for sale, it was held that there was a complete equitable assignment of the goods to the bank (3). But an agreement by A to apply money to be advanced to him by B in the purchase of goods, to sell those goods and to pay the proceeds of the goods into B's bank account, does not amount to an equitable assignment either of the goods or the proceeds, and B will not be entitled on A's insolvency to a charge either on the goods or on the proceeds of goods in the hands of A at the time of insolvency (4). Similarly it has been held that the representation made by the New Orleans Bank, the drawers of a bill of exchange on a Liverpool Bank, at the time of the sale of the bill to Louisiana Bank, that the bill was expressly or especially drawn against funds of a larger amount already remitted to the bank at Liverpool, did not constitute an equitable assignment of an equivalent amount of such funds, so as to entitle the Louisiana Bank to have the funds in the hands of the Liverpool Bank appropriated on the bankruptcy of the New Orleans Bank to meet the bills, even though the Liverpool Bank had, both at the time of the representation and of the bankruptcy, sufficient funds of the New Orleans Bank so to do (5). Again, there is a distinction between a promise to pay out of a specific fund and a promise to pay when that fund shall be received. A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment (6). In the case of an antecedent contract notice is not necessary, still it is in the interest of the assignee to give the notice of assignment to the debtor or the holder of the fund—

- (i) to prevent the debtor from paying the assignor,
- (ii) to prevent a subsequent assignee from gaining priority by giving notice (7); and
- (iii) to prevent the operation of the reputed ownership clause where the debt assigned is a trade debt.

A cheque is not an equitable assignment of a part of the drawer's balance at his bankers (8). An order given by debtor to his creditor

(1) *Exp. Adams*, 26 L. T. O. S. 96.

(2) *Exp. Imbert*, 1 DeG & J. 152; *Thayer v. Lister*, 30 L. J. Ch. 437.

(3) *London & Yorkshire Bank v. White*, 1895, 11 T. L. R. 570.

(4) *Palmer v. Carey*, 1926 A. C. 703.

(5) *The Citizen's Bank of Louisiana v. The Bank of New Orleans*, L. R. 6 H. L. 352.

(6) *Re Megaw*, L. R. 4 C. P. (1926) 666.

(7) *Dearle v. Hall*, 1823, 3 Russ. 1: 33 E. R. 475; *Marchant v. Morton, Down and Co.*, 1901 2 K. B. 829.

(8) *Hambledon v. Forster*, T. R. 19 E. R. 74.

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upon his debtor who owes money to him or holds a fund belonging to him directing him to pay the fund or the money to his creditor, creates a valid equitable charge upon such moneys or funds (1). The assent of the party whom the order is given is not necessary (2). The order must be upon the debtor or upon the person holding funds of the giver of the order. A letter addressed by a person to the solicitors of the debtor authorising them to receive the money due to him from the debtor and requesting them to pay it to his creditor does not amount to an equitable assignment, though the solicitors may promise the creditor to pay the money to him on receiving (3). It is also necessary that the order must specify the fund out of which the payment is to be made in order to make it sufficiently identifiable (4). Such an order is irrevocable (5) and is also not revoked by insolvency (6).

Where there is no antecedent contract to appropriate.—Where there is no antecedent contract to appropriate an appropriation in consideration of an existing debt from the appropriator will, if communicated to the creditor, be irrevocable because he may have foreborne to sue in consequence (7). It is necessary that the appropriation should have been communicated to the person for whose benefit it is made. Till then it is revocable and if insolvency supervenes before such communication is complete, there is no valid appropriation enforceable against the trustee in bankruptcy. Thus an order to appropriate to an agent is a mere mandate from a principal to his agent, unless it is communicated to the creditor for whose benefit it is made and is revocable (8). Where a debtor executed a deed of assignment of all his property for the benefit of his creditors in pursuance of a resolution passed previously at a meeting of the creditors, it was held that the deed was revocable till the fact of the execution had been communicated to the creditor (9). On the same principle a legal conveyance to a trustee who is himself a beneficiary seems to be irrevocable even if not communicated to the other beneficiaries (10). And the order, the communication of which by the beneficiary renders it irrevocable, must be directed to the person in whose hands is the fund charged (11). The assent of the person for whose benefit the appropriation is made is also necessary, though, in the absence of evidence to the contrary, such assent will be presumed, since the appropriation is for his advantage (12). His dissent may, however, be inferred from his conduct (13), or after long delay in assenting after notice (14).

(1) *Rodick v. Gandel*, 1 DeG. M. and G. 763, 777-778 : 42 E. R. 749, 754.

(2) *Ex parte South*, 1818, 3 Swans. 392 : 36 E. R. 907; *Morrell v. Wooten*, 1852, 16 Beav. 197 ; 51 E. R. 753.

(3) *Rodick v. Gandel*, 1 DeG. M. and G. 763, 778; 42 E. R. 749, 755.

(4) *Percival v. Dunn*, (1885) 29 Ch. D. 128.

(5) *Fisher v. Miller*, (1823) 1 Bin. 150 : 130 E. R. 61.

(6) *Alexander v. Steinhardt, Walker and Coy.*, 1903, 2 K. B. 208.

(7) *Hodgson v. Anderson*, 3 B. and C. 842; *Ranken v. Anfaro*, 5 Ch. D. 786.

(8) *Scott v. Porcher*, 3 Mer. 652; *Morrell v. Wooten*, 16 Beav. 197; *Garrard v. Lauderdale*, 3 Sim. 1; *Hill v. Royds*, L. R. 8 Eq. 290.

(9) *Ellis and Co., v. Cross*, (1915) 2 K. B. 664.

(10) *Hobson v. Thelussen*, L. R. 2 Q. B. 642.

(11) *Bell v. L. and N. W. Railway Coy.*, 15 Beav. 548.

(12) *Siggers v. Evans*, 5 E. and B. 367.

(13) *Garrard v. Lauderdale*, 3 Sim. 1.

(14) *Gould v. Robertson*, 4 Deg. and S. 509.

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Rule in Ex parte Waring.—To the rule that to constitute an equitable assignment there must be privity between the assignor and assignee either by contract or by an estoppel there is one exception, namely, the well known doctrine known as the rule in *Exp. Waring* (1). It was there held that where both the drawer and acceptor of bills become bankrupt, and as between the drawer and acceptor funds have been specifically appropriated to meet the bills, the bill holder, although in no way privy to or cognizant of the appropriation, is entitled to enforce the appropriation not on account of any equity in themselves, but of the necessities connected with the administration of the two insolvent estates, and the equity as between the insolvents. The principle is an extension of the principle that the joint estate shall be appropriated primarily to meet the joint liabilities and the separate estate to meet the separate liabilities See Section 61. The bill-holder in the leading case could sue on the bill the drawer as well as the acceptor and had a right of proof in the insolvency of both of them. He would be entitled to the securities only to adjust the equities between the administration of the estates of the drawer and the acceptor. It is therefore necessary that both the drawer and the acceptor must be insolvent (2). It is not necessary that there should be judicial insolvencies. It is sufficient if both the estates which are being administered are really insolvent (3); but they must both be under judicial administration (4). If one of the estates is solvent the rule is not applicable, because the bill-holder gets paid in full by the solvent person who is liable on the bill. If the drawer is solvent and pays, the security must be restored to him. If the acceptor is solvent and pays, he is entitled to realise the security and to indemnify himself out of the proceeds. It is also necessary that the bill holder should have a right of proof against both the estates or, in other words, both the drawer and the acceptor should be liable to pay the debt due on the bill to the bill-holder. This is what is called a right of double proof. If the drawee to whom the securities are remitted refuses to accept the bill, the acceptor is not liable, there is no right of double proof and the rule does not apply (5). But it is not in every case where there is a double insolvency and a double right of proof that this doctrine is applicable. There must also be something which the administrator of one insolvent estate is entitled to call upon the administrator of the other insolvent estate in whose possession it is to realise for the purpose of meeting their common liability (6), *i.e.* there must be securities properly appropriated and ear-marked for the payment of the bills. Where a consignor directed his consignee to place the invoice price of goods to his credit and the bills drawn against them to his debit such a direction does not amount to an appropriation of the goods to protect the bills (7); but a direction to the consignee to apply the proceeds of goods in a particular way may amount to an appropriation as the

(1) 19 Ves. 345.

(2) *Powles v. Hargreaves*, 1853, 3 DeG. M. & G. 430, (450): 43 E. R. 169, 176.

(3) *Powles v. Hargreaves*, 3 DeG. M. & G. 430; *Re The Newzealand Bank*, L. R. 4 Eq. 226; *Exp. Alliance Bank*, L. R. 4 Ch. 423.

(4) *Exp. Gomez*, L. R. 10 Ch. 639.

(5) *Vaughan v. Halliday*, L. R. 9 Ch. 561.

(6) *Exp. Lambton*, L. R. 10 Ch. 405.

(7) *Exp. Banner*, 2 Ch. D. 278.

consignor still remains the owner of the goods (1). The rule will only extend to remittances which remain in specie at the date of the insolvency, the foundation of the rule being the right of the remitter to have such remittances applied to the purpose to which they were appropriated—a right which accrues at once on the insolvency of the remittee, even though he may have been entitled while solvent to deal with them as he pleased (2). S. 28
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The rule applies even where the appropriated property is insufficient to meet the debt.—The rule in *Ex parte* Waring was held applicable by Lord Cranworth, in *Powles v. Hargreaves* (3), to all cases where the appropriated property may be equal or more than sufficient or insufficient to meet the debt due on the bill. This case was, however, disapproved by Lord Selborne in the *Royal Bank of Scotland v. The Commercial Bank of Scotland* (4), a case in which the only question to be decided was whether the rule in *Exp. Waring* applied to an administration in Scotland and it was held that it did not. In the case of insufficient securities, bill-holders who have had the benefit of the rule are entitled to prove for the balance after deducting the amount realised by the appropriated securities against the estate of the drawer and the acceptor *pari passu* with the other creditors (5). When the benefit is received after proof, the proof must be proportionately reduced and the dividends on the excess returned (6).

The application of the rule is not confined to the case of holders of bills of exchange only. It has been applied in favour of the drawer and holder of a bill although the insolvent depositor of the security was not a party to the bill, but only liable to the drawer for the price of goods sold by the drawer to the depositor and paid for by bills in respect of which the drawer was covered by the deposit of short bills (7). This case shows that the rule will apply to all cases where a joint administration of the two insolvent estates is impossible without it and this is always so where there are two or more insolvents liable in respect of the same contract and one of the insolvents has deposited with another securities to meet the joint liability.

Where two firms engaged in a joint transaction for the purchase of cotton for sale on joint account, and the joint account was to be paid for by the proceeds of bills drawn by one firm upon the other, it was held that, although the rule applied so as to entitle the bill holders to have the cotton which happened to be in the hands of a trustee of the estate of one of the firms, specifically appropriated to meet the bills, this right was subject to the right of the joint creditors of the combined firms to have the cotton, which was part of the joint estate of the combined firms, applied to the payment of their debts (8).

Distinction between the English and the Indian law.—The Indian law is the same as the English law but for the difference that, in

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- (1) *Exp. Banner*, 2 Ch. D. 278, *per* Mellish, L. J. at 289.
 - (2) *Exp. Dever*, (No. 2), 14 Q. B. D. 611.
 - (3) 3 DeG. M. & G. 430.
 - (4) 7 App. Cases. 366.
 - (5) *City Bank v. Luckie*, L. R. 5 Ch. 733, 778.
 - (6) *Re Barned's Banking Co.*, L. R. 10 Ch. 193.
 - (7) *Exp. Smart*, L. R. 8 Ch. 220.
 - (8) *Exp. Dewhurst*, L. R. 8 Ch. 965.

- S. 28** cases governed by the Transfer of Property Act, an equitable assignment
(2). of a chose in action can be effected by a written instrument only (1).

Subject matter of an equitable assignment.—In a large majority of cases the subject-matter of an equitable assignment is goods, funds or book debts. In order that there may be a present transfer of interest it is necessary that the property assigned should be in existence on the date of the assignment. A man cannot therefore assign what has no existence in equity or at law, but a man can contract to assign property which is to come into existence in future. And in equity such a contract operates as an equitable assignment as soon as the property contracted to be assigned comes into existence. In order that a contract to assign future property may operate as an equitable assignment on the coming into existence of that property, it must purport to confer an interest in it immediately by its own force and without the necessity of any future act on the part of the assignor on such property coming into existence (2). Again the property must be sufficiently described in the contract so that it may be identifiable when it comes into existence. The identification of the property is, however, necessary at the time when it comes into existence; it may not be identifiable at the time when the contract is made (3). An assignment of future book debts which might during the continuance of the security become due and owing to the mortgagor, though not limited to book debts in any particular business of the mortgagor, is an assignment of property that can be identified and passes the equitable interest in book debts arising after the mortgage whether in the business carried on by the mortgagor at the time of the mortgage or in any other business (4). A contract to assign future property is to be distinguished from a mere license to seize property, a mere license to seize future property will not be construed as an equitable assignment of that property (5). The reason is that in the case of a mere license the licensee does not acquire any interest in the property until the license or authority is executed and the property is seized (6).

If the property in respect of which there is a contract to assign comes into existence prior to the insolvency of the assignor, the equitable assignment is complete before the insolvency and is valid against the trustee (7). Where the property comes into existence after the commencement of the insolvency but before the discharge of the insolvent, we have to see as to whether the right of the assignee to claim the property had become due before insolvency or not. If this right also accrues to the assignee after insolvency of the assignor, he has no right to the property. Thus where a debt falls due after insolvency, the assignee has no right to it (8). Where a debt or liability becomes due before insolvency, though it may be payable in future, a point of time which may take place after insolvency, the assignment is complete as soon as the debt or liability

(1) Section 130, Transfer of Property Act, 1882.

(2) *Holroyd v. Marshall*, 10 H. L. C. 191; 11 E. R. 999.

(3) *Re Clarke*, (1887) 36 Ch. D. 348.

(4) *Tailby v. Official Receiver*, (1883) 13 A. C. 523.

(5) *Reeve v. Whitmore*, (1864) 33 L. J. Ch. 63.

(6) *Reeve v. Whitmore*, (1864) 33 L. J. Ch. 63; *Thompson v. Cohen*, (1872) 41 L. J. Q. B. 221; *Cole v. Kernot*, (1872) L. R. 7 Q. B. 534.

(7) See *Re Wallis*, 1902, 1 K. B. 719.

(8) *Ex parte Nicholls*, (1883) 22 Ch. D. 782; *Wilmot v. Alton*, 1897, 1 Q. B. 17; *Re Collins*, (1925) Ch. 556.

comes into existence though it may not be enforceable till after insolvency (1). S. 28
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The question of specific appropriation or equitable assignment is a question of fact. The question whether or not there has been a specific appropriation depends upon the facts of the case, the course of dealing between the parties and the mercantile usage. In all cases the court will require very strong evidence in order to hold that there has been a specific appropriation in any case (2). A very important test will be whether the remittee is, under the circumstances, entitled to deal with the remitted goods or bills or their proceeds as his own, and thus become a mere debtor to the remitter for the amount. The allowance of interest by the remitee to the remitter on the amount of the remittances would be a strong circumstance to lead to such a conclusion, and the remitter will in such case be left to his ordinary remedy by proof for the amount of such of the remittances as have been disposed of before bankruptcy (3). So far as bills and goods remain in specie at the date of the bankruptcy of the remittee, the court will order them to be applied to the purpose for which they were sent forward, even though the circumstances do no amount to a specific appropriation and this shall also be true of the proceeds of the goods or bills which have been sold or disposed of before the bankruptcy of the remittee, provided such proceeds can be distinguished (4). The mere fact that the merchant has drawn upon a bankrupt for the price of goods will not give him a right to insist on the appropriation of the goods to the payment of the price, even though the goods remain in specie in the hands of the bankrupt at the time of the bankruptcy; nor a trustee in bankruptcy, by receiving goods sold on credit after the bankruptcy, create any trust in favour of the vendor or consignor (5). The appropriation of goods to cover acceptances as between drawer and acceptor will not give the holders of the bills a lien on the goods so as to make the acceptors trustees for them, and they can only prove in the bankruptcy of the acceptors for the balance remaining after application of the goods to satisfy the acceptances (6).

Trusts where the bankrupt has a special, as distinct from a general property.—This is the third class of trusts which we have to consider. These are trusts of agency which arise from the employment of a bankrupt by others for a particular purpose, just as for example a factor, auctioneer, broker, banker and so on. In such cases the interest of the bankrupt in the property is limited by the purpose for which he has been employed and for which the goods, property or money has been sent to him. One kind of special property which arises from this relationship is that in which the bankrupt has a lien on the goods or property and which he could enforce against his principals, had he remained solvent.

(1) *Re Davis and Co.*, 1889, 22 Q. B. D. 193; *Ex parte Moss*, (1885) 14 Q. B. D. 310.

(2) *Phelps v. Comber*, 29 Ch. D. 813; *Brown Shipley and Co. v. Kough*, 29 Ch. D. 848; *David Sassoon v. National Bank of India*, 7 S. L. R. 61; 21 I. C. 520 (There was a charge over goods, but, as they were not ascertained and set apart according to the terms of the contract, the preferential claim was disallowed).

(3) *Re Broad*, 13 Q. B. D. 740; *Exp. Dever*, 13 Q. B. D. 766.

(4) *Exp. Broad*, 13 Q. B. D. 740; *Exp. Dever*, 13 Q. B. D. 766; *Exp. Dever*, (No. 2), 14 Q. B. D. 611.

(5) *Exp. Whittaker*, L. R. 10 Ch. 446.

(6) *Banner v. Johnston*, L. R. 5 H. L. 157.

- S. 28** These relationships shall be separately treated for convenience of
(2). discussion.

Commission agent or factor.—Goods may be entrusted by other persons to a commission agent or factor for sale. In respect of such goods he is only a bailee and holds the goods for his principal in that fiduciary capacity (1). On the insolvency of the factor or the agent the goods, if in existence on the date of the insolvency, will not pass to the receiver but will remain the property of the principal. If they have been already sold but the purchase money is not received before insolvency the principal has the right to recover the price from the buyer and not the receiver. If the goods have been sold and their price also received by the agent before the commencement of the insolvency, and it has been kept separate or can be otherwise distinguished the sale price shall belong to the principal. If after the receipt of the price, the agent has invested it in other goods those goods will belong to the principal (2). If the price has been received by the bankrupt and was not ear-marked the principal has a mere right of proof (3). When the sale price has been mixed by the agent with his own money, the principal has no right to follow the money as, according to the ordinary course of business, such intermixture is not wrongful and on such intermixture merchants voluntarily become creditors and not *cestue que trustent* of their factors (4). The special property in the goods which the bankrupt has (*i.e.*, lien for his commission and other charges etc.) vests in the receiver and he can exercise it or enforce it against the principal.

Brokers—The case of brokers stands on the same footing as that of an agent or factor. Stockbrokers need, however, special consideration. By the rules of the London Stock Exchange, when a member is declared a defaulter, contracts made by him for the next settling day for the purchase and sale of stocks and shares are closed by a person called the official assignee, appointed by that body, at the market prices at the time of the default. Those members who, on that footing, owe differences upon their contracts with the defaulter are bound to pay those differences to the official assignee and the official assignee is bound to employ the money thus received by him in paying to those members to whom on the same footing differences are due upon their contracts with the defaulter, the differences so due to them. The artificial fund so created is a trust with the official assignee as the trustee and it does not pass to the trustee in bankruptcy (5). The trust is however limited for the purposes of paying off the stock exchange creditors. If there is a surplus after such payment this will form part of the general assets of the bankrupt and belong to the trustee (6).

When a member of the Stock Exchange is declared a defaulter, all his assets are transferred to the official assignee of the Stock Exchange

(1) *Firm of Gianchand Lila Ram*, in the matter of, 131 I.C. 705 : A. I. R. 1931 Sind 70.

(2) *Taylor v. Plumer*, (1815) 3 M. & S. 562 : 105 E. R. 721 ; *Ex parte Severs*, 1800, 5 Ves. 169 : 31 E. R. 528.

(3) *Whitecomb v. Jacob*, 1 Salk. 161 ; *Godfrey v. Furzo*, 3 T. Wms 86 ; *Scott v. Surman*, (1742) Willes, 400.

(4) *Frith v. Cartland*, 34 L. J. Ch. 301 ; *Pennell v. Deffell*, 23 L. J. Ch. 115.

(5) *Exp. Grant*, 13 Ch. D. 667 ; *Re Wood*, 82 L. T. 504.

(6) *King v. Hutton*, (1900) 2 Q. B. 504.

and this assignment is an act of bankruptcy (1). Such an assignment, unless invalidated by bankruptcy proceedings, is valid against persons who are not as well as those who are members (2). On the bankruptcy of the defaulter the assignment becomes void except to the extent of the artificial fund which is a trust. Proceedings in the stock exchange liquidation do not prevent the creditor of the defaulting member from suing him for the balance of the accounts after giving credit for dividend received (3), or from presenting a bankruptcy petition founded on such balance. Where brokers were employed by a customer to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price, and he paid the margin in cash or in account, and it was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of the customer's security so purchased, but the brokers pledged their customer's security and their own generally with their bankers as cover for their own overdraft, and on the bankruptcy of the brokers, the bank paid themselves by selling the securities of the broker's customer and handed over the surplus securities in their hands to the trustee in bankruptcy it was held that, by analogy to the doctrine of marshalling, the customer was entitled to have the surplus securities in the hands of the trustee applied towards the satisfaction of the balance due to him from the brokers on the account between them (4). Where securities or a sum of money are handed to the broker for a specific purpose, the ordinary rule will apply and they would belong to the customer (5).

Auctioneer.—An auctioneer is an agent of the person who sends him goods for sale. In the absence of any usage or any evidence of an agreement by which the principal becomes the creditor of the auctioneer, the presumption is that the principal looked for payment of the goods to the price thereof and not to the general credit of the auctioneer. Where an auctioneer receives the purchase price of goods sold by him and the money can be traced in his hands, the price, less commission, must be handed over to the vendor by the trustee of the auctioneer's estate (6). And it appears that if the money obtained by the sale of the goods is mixed by him with his own moneys, the principle enunciated in *Re Hallet's estate*, 13 Ch. D. 696, in regard to following trust money shall apply.

Bankers.—The ordinary relation between a banker and his customer is that of a debtor and a creditor. From the moment the customer sends money to the bank, it becomes the property of the bank which becomes indebted to his customer to that extent. Thus money paid into current account (7), or as a deposit for a fixed period (8), is money lent by the

(1) *Tomkins v. Saffery*, 3 A. C. 13; *Richardson v. Stormolt, Todd & Co.*, (1900) 1 Q. B. 701, at page 711, *per* Collins, L. J.; *Ponsford, Baker & Co. v. Union of London & Smith's Bank, Ltd.*, (1906), 2 Ch. 444, p. 450.

(2) *Richardson v. Stormolt, Todd & Co.*, (1900) 1 Q. B. 701; *Lomas v. Graves & Co.*, (1904), 2 K. B. 557.

(3) *Mendelssohn v. Ratcliff*, (1904) A. C. 456.

(4) *Re Burge, Woodall & Co.*, (1912) 1 K. B. 393.

(5) *King v. Hutton*, (1900) 2 Q. B. 504.

(6) *Re Cotton deceased*, 108 L. T. 311.

(7) *Foley v. Hill*, 1848, 2 H. L. C. 28; 9 E. R. 1002; *Re Agra and Masterman's Bank*, 1867, 36 L. J. Ch. 151, *Ex parte* Lloyd, (1904) 91 L. T. 665.

(8) *Official Assignee of Madras v. Ram Chandra Aiyer*, (1910) 33 Mad. 134, 149, 141-142; 5 I. C. 974; *Official Assignee of Madras v. Smith*, 1909, 32 Mad. 68; 1 I. C. 712.

- S. 28** customer to the banker. But money deposited for safe custody only and
(2). nothing else is money held by the banker in a fiduciary capacity (1). A simple demand for payment does not transform the banker into a trustee and, if the banker fails before payment, the customer will only have a right of proof for the amount due to him (2).

Where a person pays money into a bank not as a deposit or into his current account but with a direction for applying it in a specific manner, different considerations will arise. If the banker stops payment before taking any steps towards applying it to the purpose the payer cannot recover the money paid but has merely a right of proof as a general creditor (3). If the money has been applied as directed or the banker has taken some step so to apply it and has by so doing ceased to be merely a debtor in respect of that money, it will not pass to the receiver in the banker's insolvency. It is necessary that steps towards the application of the money as directed should have been taken; mere consent on the part of the banker that he would apply the money as directed is not enough (4). It has been held by the Madras High Court that where money is sent to a banker with instructions to pay over the same to another person who has no account with the banker and the banker writes to that person stating that he has placed the money to his credit (5), or that he held the money in suspense account pending instructions from him (6), the banker holds the amount not as a banker but in trust for that person.

Where the customer, instead of sending cash money sends bills or cheques to the bank, it is a question of fact whether the banker becomes an agent or a debtor in respect of such bills to the customer. If the bills are remitted for a particular purpose, they do not pass to the banker's trustee in bankruptcy (7). Where the bills are not sent for a particular purpose the question for decision in each case is one of fact rather than of law, that is whether the bills were received by the banker as agent or as purchaser. Where the bills are sent generally for discount (8), or where the bills consist of instruments payable on demand (9), the presumption is that the bank received them as cash and that on payment the banker becomes a debtor only. In regard to short bills, *i. e.*, bills not yet due, the presumption is that if a party places them in his banker's hands, the property continues in the party paying them in, for it is a well known custom that bankers receive such bills as agents in order to obtain payment of them when due (10). The presumption so

(1) *Kanshdun Khan Kabuli v. Official Assignee, Madras*, A. I. R. 1936 Mad. 21: 160 I. C. 303.

(2) *Official Assignee of Madras v. Ram Chandra Iyer*, 1910, 33 Mad. 134: 5 I. C. 774, per Abdur Rahim, J.; *Official Assignee of Madras v. Krishna Bhatta*, 1911, 34 Mad. 128: 6 I. C. 213.

(3) *In Re Barned's Banking Co.*, 39 L. J. Ch. 635.

(4) *Official Assignee of Madras v. Luprian*, 1911, 34 Mad. 121: 6 I. C. 387, on appeal from 33 Mad. 145: 5 I. C. 312.

(5) *Official Assignee of Madras v. The Oriental Life Assurance Co.*, 1910, 33 Mad. 150: 5 I. C. 200.

(6) *Official Assignee of Madras v. Rajam Ayyar*, 1911, 36 Mad. 499: 6 I. C. 383, (on appeal from 33 Mad. 299: 8 I. C. 138).

(7) *Parke v. Eliason*, 1 East. 544; *Thompson v. Giles*, 2 B. and C. 422.

(8) *Exp. Sargeant*, 1 Rose 153.

(9) *Re Mills, Bawtree and Co.*, 10 Mor. 193.

(10) *Thompson v. Giles supra*; *Exp. Twogood*, 19 Ves. 229; *Exp. Pease*, 19 Ves. 25.

arising is however a rebuttable presumption as evidence can be led to show that the bills, though not yet due, were treated by the parties as cash and treated as such. Where there is such an evidence, it shall be presumed that the bank received the bills as cash and it became a mere debtor to that extent. The mere fact that the banker has entered the bills as cash or that he has allowed the customer to draw against the bills, or that the customer has endorsed the bills is not in itself sufficient on the bankruptcy of the banker to entitle the trustee to hold the bills against the customer (1).

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(2).

In the absence of a contract, express or implied, to the contrary the bankers have a general lien on the securities deposited with them by a customer for the amount of their general balance (2).

Property or money deposited with the bankrupt for a specific purpose. Where the money is deposited for a specific purpose with a banker see discussion in the foregoing paragraph. In regard to property deposited with the bankrupt for a specific purpose, the general rule is that it should be returned to the depositor by the trustee in bankruptcy, unless the bankrupt has a beneficial interest in the performance of the trust, in which case the depositor is only entitled to the return of the deposit on satisfying the lien or other interest of the bankrupt (3). Where money was advanced to a county bank on the understanding that it should not be used unless there was a probability of its being sufficient to carry the bank over an expected crisis, and the bank finding that it would not be sufficient for that purpose returned the money to the lender and stopped payment, it was held that the assignees in bankruptcy could not recover the money so repaid, because neither they nor the bankrupt banker had any right to retain the money, the special purpose for which it was advanced having failed (4). Money advanced to a bankrupt for the purpose of paying pressing creditors, and impressed with a trust for that purpose, cannot be recovered from a creditor to whom it has been paid (5). Money must have been deposited for a specific purpose; a mere deposit by itself is not enough (6). Where an employer deposits a cash security with his employee for good behaviour, no trust is created in respect of it, and on the insolvency of the employer the former has only a right of proof (7).

Trusts of agency and reputed ownership.—Goods in the possession of the bankrupt as agent, broker or factor are subject to the reputed ownership clause. For that see commentary under sub-section 3 of the present section.

(1) *Thompson v. Giles*, 2 B. and C. 422; *Exp. Twogood*, 19 Ves. 229; *Exp. Pease*, 19 Ves. 25.

(2) *Davis v. Bowsher*, 5 T. R. 481; *Brandao v. Barnett*, 12 Cl. and Fin. 787; *Re Meadows*, 28 L. J. Ch. 891; *Jones v. Peppercorne*, 28 L. J. Ch. 158; *Exp. Barkworth*, 27 L. J. Bk. 5; *Watts v. Christoe*, 18 L. J. Ch. 173.

(3) *Exp. Buchanan*, 1 Rose. 280; *Exp. Pease*, 1 Rose. 232.

(4) *Edwards v. Glyn*, 28 L. J. Q. B. 350. See also *Exp. Kelly*, 11 Ch. 306.

(5) *Re Rogers*, 8 Mor. 243; *Re Drucker*, (1902) 2 K. B. 237; *Re Watson*, 107 L. T. 783; *Re Hooley*, (1915) H. B. R. 181; see also *Gurdit Singh v. Chunilal*, 134 I. C. 100; A. I. R. 1932 Lahore 66.

(6) *Satyamma v. Official Receiver, Krishna district*, 146 I. C. 699; A. I. R. 1933 Mad. 917.

(7) *Ramchand v. Mohammad Akram Khan*, A. I. R. 1937 Lah. 444.

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(2).

Vesting of rights so limited as to be defeasible or otherwise modified on bankruptcy.—In England an owner of property may, upon alienation inter vivos or by will, qualify the interests of his alienee by a condition defeating it on his bankruptcy, so that it will not pass to his trustee on his bankruptcy (1). In India such a restriction is valid only if made by will (2). If such a condition is imposed in the case of a transfer by deed it is void under the Indian law (3). In England such a restriction on the rights of the alienee is very often found and the construction of the covenants or terms dealing with such restrictions have been considered in a number of cases. We proceed to note certain rules of construction established by English decisions:—

(i) Conditions operating by way of defeasance should be construed strictly. Thus it has been held that a defeasance on assignment, unless there is a specific provision to the contrary, means a voluntary assignment and does not extend to an assignee in bankruptcy under the old law (4). Similarly where an absolute interest purported to be defeated on assignment or bankruptcy without any limitation over, it was held that the condition was *in terrorem* merely, and the defeasance void (5). It is not clear—and there appears to be some conflict of opinion—as to the exact effect of insolvency on annuity which is given for the bankrupt's personal support, and to be paid from time to time into its proper hands and not to any other person and his receipt alone to be a sufficient discharge, or the payment of which is subject to the condition that it shall cease if the annuitant should "at any time do or permit any act, deed, matter or thing whatsoever, whereby the same shall be aliened, charged or incumbered in any manner whatsoever," or such similar limitations. Where the limitation was that the annuity was given for the bankrupt's personal support and the intention was to make it unassignable, it was still held that such an annuity passed to the annuitant's assignees in bankruptcy (6). But where the limitation was that the annuitant should not at any time do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged or incumbered in any matter whatsoever, it has been held that bankruptcy determined the annuity (7). In another English case it was held that neither the filing of the bankruptcy petition by the debtor nor the execution of a deed of composition effected a forfeiture under a clause for forfeiture of the debtor's life interest under a post-nuptial settlement if he should assign, charge or otherwise dispose of the income or should become bankrupt, or do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person (8). In a Calcutta case where the rules of the company provided that in case the member transferred his interest during service, he was liable to forfeit his rights for the amount to the company, it was held that

(1) *Roe v. Galliers*, 2 T. R. 133.

(2) Sec. 120, illustration 7, Indian Succession Act, 1925; Ernest Clarence O'Brien, *In re*, A. I. R. 1933 Cal. 701: 60 Cal. 926: 147 I. C. 422.

(3) Sec. 12, T. P. A., 1882; Ernest Clarence O'Brien, *In re*, A. I. R. 1933 Cal. 701 *supra*

(4) *Lear v. Leggett*, 2 Sim. 479; *Re Harvey*, 6 Mor. 95.

(5) *Bird v. Johnson*, 18 Jur. 976.

(6) *Graves v. Dolphin*, (1826), 1 Sim. 66; *Brandon v. Robinson*, 1 Rose. 197.

(7) *Exp. Eyston*, 7 Ch. D. 145: *Re Sartoris' Estate*, 1892., 1 Ch. 11; *Re Laye*, (1933) 1 Ch. 298: *Re Amherst's Trusts*, L. R. 13 Eq. 464.

(8) *Exp. Dawes*, 17 Q. B. D. 275.

the effect of the member's adjudication as an insolvent on a petition presented by himself was to transfer or assign immediately his property to the official assignee and that it was equivalent to a voluntary transfer by the debtor to the official assignee within the meaning of the provident fund rule (1). From the same case it appears that it would not have been so held had the member not been adjudicated on his own petition. An interest applicable for the benefit of a bankrupt at the absolute discretion of the trustees will not pass to the trustee in bankruptcy (2), although any part which the trustees do so apply in excess of what is necessary for his mere support must be accounted for by the bankrupt to the trustee (3).

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(2).

(ii) In forfeiture clauses contained in wills and settlements, words which grammatically refer to the future have been construed as including an existing event in order to give effect to the manifest wishes of the testator or settlor (4). The reason for this rule of construction has been thus explained: "The testator's attention is clearly not directed to the declaration of bankruptcy or to the period when the declaration may take place, but only to this, that the property intended for the objects of his bounty shall not pass to a stranger. He does not wish that the gift shall be a benefit to be conferred upon creditors or upon any other than the devisee. The true intension of the will therefore requires that the words of futurity should be stretched so as to include a bankruptcy existing at the date of his death (5). This rule however does not apply to the case of a condition in a covenant (6).

(iii) In the case of a gift of income, where there is a forfeiture clause determining the right on bankruptcy, the rule appears to be that if at the time when the right to have the first payment of income accrues the bankruptcy is annulled, there is no forfeiture in law (7). The reasons have been thus explained: "The question is: Has a forfeiture occurred when before any actual demand made or possession taken by the official assignee, before one six-pence had accrued to him, the bankrupt, by his diligence and activity, obtained an annulment of the bankruptcy, so that at the time when the first rents accrued there was no hand but his to receive them?I think, having regard to those cases in which the Courts have stretched the words of testators by making expressions which sound in the future apply to the past in order to effectuate the intent and to prevent the funds going into other hands than those of the objects of his bounty, I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them" (8). If at the time when the right to have the

(1) Ernest Clarence O'Brien, *In re*, A. I. R. 1933 Cal. 701.]

(2) *Holmes v. Penny*, 3 K. & J. 90.

(3) *Re Ashby*, (1892) 1 Q. B. 872.

(4) *Manning v. Chambers*, 1 Deft. and Sm. 282; *Seymour v. Lucas*, 1 Dr. & Sn. 177; *White v. Chitty*, L. R. 1 Eq. 372; *Trappes v. Meredith*, L. R. 7 Ch. 248; *Re Evans*, (1920) 2 Ch. 304.

(5) *White v. Chitty*, L. R. 1 Eq. 372 at pp. 375, 376.

(6) *West v. Williams*, 1899, 1 Ch. 132, 148.

(7) *White v. Chitty*, L. R. 1 Eq. 372, pp. 375, 376; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Re Parnham's Trusts*, 45 L. J. Ch. 80; *Samuel v. Samuel*, 12 Ch. D. 152; *Ancona v. Waddell*, 10 Ch. D. 157.

(8) *White v. Chitty supra*, per Pagewood, V. C.

- S. 28** first payment of income accrues the bankruptcy is not annulled, the right is then finally vested in the persons entitled to the gift over and it is impossible to take it away from them (1). Where a testator, who died on 3rd November, 1865, by his will, dated 5th August, 1865, gave a legacy to a son for life, if not at his (testator's) death an uncertificated bankrupt, and the son had been adjudged bankrupt on his own petition on 20th September, 1865 and the bankruptcy was annulled on his own petition on 2nd March, 1866, it was held that the gift was only made provided the donee was not a bankrupt, which was a condition precedent annexed to the gift, and the legatee, being a bankrupt, did not fulfil the condition, and consequently there was no gift, and the legatee was not entitled to the legacy (2).

(iv) A limitation by the bankrupt defeating his own interest in his property on bankruptcy is inoperative as being in fraud of his creditors and as such void against the assignee in bankruptcy. The owner of the property cannot, therefore, by contract or otherwise, qualify his own interest by a condition determining or controlling it in the event of his own bankruptcy to the prejudice of his creditors (3). The proposition may be illustrated by the facts of a case. A patentee sold to some iron manufacturers a patent in consideration of the manufacturers paying to the patentee certain royalties, and they at the same time lent him a sum of money, on the terms that the manufacturers were to be entitled to retain half the royalties towards the satisfaction of the loan but with a proviso that if the patentee became bankrupt the manufacturers might retain the whole of the royalties. It was held that the proviso was a fraud on the bankruptcy laws and void (4). The rule only applies where but for the limitation the property would have vested in the trustee and to the extent that it would have vested. Thus it has been held that where a settlor's life estate was forfeited by reason of his first bankruptcy under which the settlement was set aside so far as it was necessary to pay the bankrupt's provable debts, and those debts were paid in full, the life estate did not vest in the trustee in a second bankruptcy (5). Similarly a limitation of property belonging to a wife until the bankruptcy of her husband has been held valid (6). Articles of a limited company providing that the shareholders shall be compellable in the event of bankruptcy to sell their shares to certain persons described in the articles at a fixed price, such price being a fair one and not obnoxious to the bankruptcy law, are binding on the trustee in bankruptcy of a shareholder (7).

A gift over a man's own property in the event of a voluntary assignment by will (unlike the event of his own bankruptcy) is valid (8),

(1) *Robertson v. Richardson*, 30 Ch. D. 623; *Metcalfe v. Metcalfe*, 1918, 3 Ch. 1; *Re Loftus Otway*, 1895, 2 Ch. 235; Compare also *Re Clarke*, (1926) Ch. 833.

(2) *Cox v. Fonblanque*, L. R. 6 Eq. 482.

(3) Note to report of *Wilson v. Greenwood*, 1 Swan. 471; *Exp. Warden*, 21 W. R. 51; *Re Brewer's settlement*, 1896, 2 Ch. 503; *Holroyd v. Gwynne*, 2 Taunt. 176; *Whitmore v. Mason*, 2 J. & H. 204; *Exp. Williams*, 7 Ch. D. 138; *Exp. Jay*, 14 Ch. 19; *Re Johns*, (1928) Ch. 737.

(4) *Exp. Mackay*, L. R. 8 Ch. 633.

(5) *Re Johnson*, (1904) 1 K. B. 134.

(6) *Higinbotham v. Holme*, 19 Ves. 88.

(7) *Borland's Trustee v. Steel*, (1901) 1 Ch. 279.

(8) *Brooke v. Pearson*, 27 Beav. 181; *Knight v. Browne*, 9 W. R. 515.

and the principle applies to an involuntary alienation by operation of law in favour of a particular creditor (1). S. 28
(2).

(v) For the construction of forfeiture clauses in leases on alienation see the undermentioned cases (2) and for the construction of similar clauses in leases on bankruptcy see the undermentioned cases (3). These rules are highly technical and depend upon many peculiarities of the English laws with which the Indian practitioner is not conversant. Besides, the subject of leases is complicated further by the provisions in the English and the Presidency-towns Insolvency Acts, relating to the disclaimer of leases in certain cases (4). They have therefore been omitted from the present Act as being of no practical importance.

Rights modified by insolvency.—Where the fact of insolvency qualifies the rights of a contracting party the rights which pass to that party's trustee in bankruptcy are not the rights which the bankrupt would have had, if solvent, but only those which would remain in him notwithstanding his insolvency. In regard to contracts relating to goods the Indian Sale of Goods Act gives certain rights to an unpaid seller of goods against the goods on the insolvency of the vendor or purchaser. It is provided by section 46 that, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods has in the case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them. Again, by section 47 the unpaid seller is entitled to retain possession of the goods where the buyer becomes insolvent until payment or tender of the price is made to him. And this right of lien can be exercised under section 43, even where there has been a part delivery of the goods unless such part delivery has been made under such circumstances as to show an agreement to waive the lien. Under section 50, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit and he may retain them until payment or tender of the price. When there is a contract for the sale of non-specific goods to be delivered by instalments and the purchaser becomes insolvent before some of the instalments become due, the seller, notwithstanding that he may have agreed to give credit for the goods, is not bound to deliver to the insolvent any more goods under the contract until the price of such goods is tendered to him and, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered as well as the price of those still to be delivered (5). This subject is dealt with by the legislature in Chapter 5 of the Indian Sale of Goods

(1) *In re Detmold*, 40 Ch. D. 585. See also *Re Brewer's settlement*, 1806, 2 Ch. 503, p. 506; *Re Johnson*, 1904, 1 K. B. 134; *Denny's Trustee v. Denny and Warr*, (1919) 1 K. B. 583.

(2) *Re Riggs*, 1901, 2 K. B. 16; *Re Griffiths*, (1926) Ch. 1907; *Re Forder*, 1927, 2 Ch. 291; *Goring v. Warner*, 1724, Eq. Cas. Abr. 100; *Doe v. Bevan*, 3 M. & S. 353; *Re Farrow's Bank, Ltd.*, 1921, 2 Ch. 164, *per* Younger, L. J.; *Smith v. Gronow*, 1891, 2 Q. B. 394.

(3) *Civil Service Co-operative Society, Ltd. v. The Trustee of Sir J. R. D. McGrigor, Bart.*, 1923, 2 Ch. 347; Sec. 146, I. P.A., 1925. (English).

(4) Section 54, B. A., 1914; Sec. 55, B. A., 1883, and Secs. 62 to 67, Pt. I.A., 1909.

(5) *Exp. Chalmers*, L. R. 8 Ch. 289.

- S. 28 Act and for detailed treatment the reader is referred to any standard
(2). work on that Act.

Another instance in which the bankrupt's rights on a contract are affected by his insolvency is afforded by contracts, the performance of which depends on the personal skill of the bankrupt himself. The trustee in bankruptcy has no power to compel the bankrupt to perform the contract (1) and he cannot insist on performing it vicariously for the bankrupt because the work not being done by the bankrupt personally is not the work contracted for (2). Thus if an insolvent has entered into a building contract before his insolvency and the contract provides that the building work shall be executed by "his executors and administrators" omitting assigns, the official assignee is not entitled to claim to complete it (3). Similarly a personal contract by an author with his publisher to publish a work cannot be specifically enforced by the receiver on the insolvency of the publisher (4). But a contract to promote a company and to procure subscriptions for a certain number of the shares of the company is not a contract for personal service (5). If the bankrupt chooses to perform the contract or is ready and willing to do so, the trustee will be able on his part to insist on performance on the part of the other contracting party and to sue him for the consideration if the contract is performed or for the breach if the other contracting party by his refusal prevents its performance.

As to what makes the personal skill of the bankrupt such an essence of the contract as to entitle the other contracting party to refuse anything else is a question of fact depending upon the nature of the work contracted for and also on the intention of the parties. For cases where it has been considered the reader may refer to section 21, Specific Relief Act, which provides that a contract, which is so depending on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce its terms, is incapable of being specifically enforced.

As regards the rights of the assignee in regard to contracts generally it may be noted that what the receiver gets are the rights the insolvent had under the contract as an insolvent and not rights which the insolvent would have had, had he remained solvent (6). Thus a man who had agreed to do work and labour for an insolvent for a fixed period is not bound to go on serving him unless the receiver pays his dues to him. With that reservation the contract continues and the receiver is entitled to claim its performance (7). Bankruptcy does not determine the contract (8), but on insolvency it shall be for the trustee to elect as to whether he requires the other party to perform the contract and his election to take up the contract must be made within a reasonable time (9). If the trustee in bankruptcy does not declare his

(1) *Bailey v. Thurston*, 140, 1 K. B. 137, 145.

(2) *Knight v. Burgess*, 33 L. J. Ch. 727.

(3) *Knight v. Burgess* *supra*.

(4) *Lucas v. Moncrieff*, 1903, 21 T. L. R. 683.

(5) *Re Worthington*, 1914, 2 K. B. 299.

(6) *Grey v. Lamond Walker*, 40 Cal. 523.

(7) *Re Sneezeum*, 1876, 3 Ch. D. 463.

(8) *Brooke v. Hewitt*, 3 Ves. 253.

(9) *Exp. Chalmers*, 1873, L. R. 8 Ch. App. 289; *Morgan v. Bain*, 1874, L. R. 10 C. P. 15; *Grey v. Lamond Walker*, 40 Cal. 523.

election within a reasonable time it shall be held to be evidence of abandonment by him (1). Thus when the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods the trustee in bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But if he does not do so, the vendor is entitled to treat the contract as broken and to re-sell the goods without first tendering them to the trustee. The benefit of a contract for the sale of any other property to the insolvent passes to the receiver (2). Similarly the benefit of a contract for a lease to the insolvent (3), and the benefit of an option to take a lease passes to the official assignee or receiver (4).

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(5).

For the vesting of a right of action for breach of contract for personal service see *infra*.

Property exempted from attachment and sale under the Code of Civil Procedure, 1908, or any other enactment for the time being in force.—It is provided by sub section 5 of the present section that the property of the insolvent for the purposes of this section shall not include any property (not being books of accounts) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree. Under the Presidency-towns Insolvency Act, section 52 exempts certain property, as the tools of the bankrupt's trade, his necessary wearing apparel etc., not exceeding in value three hundred rupees in the whole, from becoming divisible amongst the creditors. Under the Provincial Insolvency Act the exemptions extend to whenever they are provided by the law.

Property exempt under the Code of Civil Procedure—S. 60, C. P. C., deals with the property which is liable to attachment and sale in execution of a decree and that which is not so liable. It is beyond the scope of this work to consider in detail the provisions of that section. All that can be done and will be sufficient for our present purposes is to draw the attention of the reader to certain important classes of property mentioned therein. Books of account are exempt under section 60 but, notwithstanding that, they vest in the receiver by the express wording of sub-section (5). A mere right to sue for damages, an expectancy of succession by survivorship or a merely contingent or possible right or interest is also exempt from attachment and sale in execution of a decree (5). Under the English Law all interests and profits, whether present or future and whether vested or contingent, are included in the definition of property given in S. 167, B. A. of 1914, and as such they vest in the receiver. All these rights do not always vest in the receiver under the present Act, as they are exempted under S. 60, C. P. C. Ordinarily rights of action for breaches of contracts in respect of the insolvent's property vest in the receiver. For that see *infra*. But under S. 60, C. P. C., a mere right to sue for damages is exempt from such vesting. It is not clear how far the word 'mere' in clause (e) of the section is important

(1) *Lawrence v. Knowles*, 5 Bing. N. C. 399; *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108.

(2) See *Brooke v. Hewitt*, 1796, 3 Ves. 253; 30 E. R. 997; *Willingham v. Joyce*, 1796, 3 Ves. 168; 30 E. R. 951; *Buckland v. Hall*, 1808, 8 Ves. 92; 32 E. R. 287.

(3) *Exp. Stapleton*, 10 Ch. D. 586; See also *Grey v. Lamond Walker*, 40 Cal. 523.

(4) *Buckland v. Papillan*, 1866, L. R. 2 Ch. App. 67.

(5) Section 60, Clauses (e) and (m).

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(5).

and narrows down the scope of the exemption. In section 6, clause (e), Transfer of Property Act, 1882, it is also provided that a mere right to sue cannot be transferred. The word 'transfer' has been defined in section 5 of the Transfer of Property Act and it appears that it does not include a transfer by operation of law. Still, though a mere right to sue is not prevented from vesting in the receiver by section 6, when read with section 5, it may be safely assumed that such rights do not vest in the receiver on general principles of law. Again, though by section 6 a mere right to sue is not transferable, but an actionable claim as defined in S. 3, Cl. (c), T. P. A., is ; and it is not always easy to determine when a particular right is a mere right to sue and not an actionable claim and *vice versa*. Whether a claim for damages arising out of a breach of contract or in tort is a mere right to sue under S. 6, T. P. A., and as such non-transferable is a question to be decided on the facts of each case (1). Thus it has been held that the right of a person to recover damages for the breach of a contract is merely a right to sue (2) ; so is a claim to *mesne* profits (3). There appears to be a difference of opinion as to whether a right to sue for accounts arising out of a breach of contract is a mere right to sue or an actionable claim. It has been held that a right to sue the gumashta for accounts is a mere right to sue (4). The contrary has been held in other cases (5). It has been held by the Sind Court that the subject matter of a suit for taking accounts of a dissolved partnership is property which is liable to attachment and sale in the execution of a decree and as such it vests in a receiver (6). Where a person sues not for the recovery of the actual crops but for compensation for wrongful appropriation of crops by the defendant in violation of the agreement, the suit is professedly one for damages resulting from breach of contract. Such a right of action is purely personal and incapable of assignment or of attachment and sale in execution of a decree. Such a right does not vest on the insolvency of such a person in the official assignee in view of section 28 (5) (7).

Salary.—Salary is property of the insolvent within the meaning of section 28 (2), and it is exempt only to the extent it is provided by S. 60, C.P.C. (8). Under the Presidency-towns Insolvency Act it is provided by section 60

(1) *Jewan Ram v. Rattan Chand*, A. I. R. 1921 Cal. 795 : 70 I. C. 498 ; *Seth Vishindas Nihalchand v. Thaverdas*, A. I. R. 1925 Sind 18 : 80 I. C. 642.

(2) *Abu Mohomud v. S. C. Chunder*, 36 Cal. 345 ; *Hira Chand v. Nem Chand*, 73 I. C. 465 : A. I. R. 1923 Bom. 403 : 47 Bom. 719 ; *Nakhola v. Kokaya*, 69 I. C. 234 : A. I. R. 1923 Nag. 67 (2) ; *Jangli Mal v. Pioneer Flour Mills*, 106 P. R. 115 : 27 I. C. 115 : A. I. R. 1914 Lab. 510 ; *Yadavendra v. Sri Nivasa*, 47 Mad. 698 : A. I. R. 1925 Mad. 62 : 80 I. C. 5 ; *Gopala v. Rama Swami*, 21 M. L. J. 153 : 6 I. C. 290 ; *Ram Dyal v. Mukat Manohar*, A. I. R. 1937 All. 317.

(3) *Jai Narain v. Kishan Dutta*, 3 Patna 575 : A. I. R. 1924 Patna 551 : 78 I. C. 705 ; *Durga v. Kailash*, 2 C. W. N. 43 ; *Seetamma v. Venkata Ramanayya*, 38 Mad. 308 : 21 I. C. 387 : A. I. R. 1916 Mad. 473 (1).

(4) *Kshetra Mohan v. Biswa Nath*, 51 Cal. 972 : A. I. R. 1924 Cal. 1047 : 82 I. C. 411 ; *Kalusa v. Madho Rao*, 96 I. C. 339 : A. I. R. 1926 Nag. 357.

(5) *Churamani v. Rajendra*, 42 I. C. 390 (b) : A. I. R. 1918 Cal. 445 (1) ; *Shri Nath v. Kanhaiyalal*, A. I. R. 1924 Nag. 145 : 75 I. C. 817.

(6) *Seth Vishindas-Nihalchand v. Thaverdas*, A. I. R. 1925 Sind 18 : 80 I. C. 642.

(7) *Lila Dhar-Uttam Chand v. Nago*, A. I. R. 1933 Nag. 6.

(8) *Chandra Neogi v. Shyamcharan Bose*, 18 C. W. N. 1052 : 19 C. L. J. 83 : 21 I. C. 950 : A. I. R. 1914 Cal. 1.

that where an insolvent is an officer of the Army or Navy, or of His Majesty's Royal Indian Marine Service, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the official assignee shall receive for distribution among the creditors so much of his pay or salary liable to attachment in execution of a decree as the Court may direct. In a case arising under the Presidency-towns Insolvency Act, during the insolvency proceedings there was an arrangement by which the insolvent agreed to allocate certain portion of his earnings to the official assignee and an order under section 62 was made by the insolvency court upon the employer of the insolvent to withhold that portion from the insolvent's earnings, it was held that the earning was not attachable, the order was illegal and the employer had a right to show that it ought not have been made upon him. In the same case it was held that 'salary' means a certain definite sum paid periodically for personal services, and that it does not include the remuneration of a daily piece-work labourer, whose daily wages are calculated on the quantity of work turned out by him and therefore varied from month to month according to the number of days he worked and the amount of work he turned out (1).

S. 28
(5).

Under S. 66, P. I. A., provision is made for granting an allowance to the insolvent for the support of himself and his family. In some cases it was held that half the salary of a Government servant was exempt from being distributed amongst the creditors under section 28 (5), read with S. 60, C. P. C., and the court could not grant him an allowance exceeding the amount of the salary so exempt under section 66. The matter has been fully dealt with in the commentary on the latter section.

Section 60, clause (k).—It runs as follows: "All compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far they are declared by the said Act not to be liable to attachment."

The above section refers to the Provident Funds Act of 1897. Now the matter is governed by the Provident Funds Act, 1925. Section 2, sub-section (4) of the Act of 1897 defined the words 'compulsory deposit' as meaning a subscription or deposit which is not repayable on the demand or at the option of the subscriber or depositor, and including any contribution which may have been credited in respect of, and any interest or increment which may have accrued on such subscription or deposit under the rules of the fund. And it was provided by section 4 of the same Act that after the commencement of the Act the 'compulsory deposit' in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to or a depositor in such fund and neither the official assignee, nor a receiver appointed under chapter XX, C. P. C., shall be entitled to or have any claim on any such 'compulsory deposit.' Sub-section (2), section 4 of the same Act also provided that the amount payable to a widow or child from a Provident Fund was not even in their hands to be treated as the assets of the deceased depositor's estate. Under that Act it was held that whether an employee is in service or out of service, whether he be alive or dead, his share of the provident fund could not be attached in the hands of the provident institution (2). The

(1) *Buckingham and Carnatic Co., Ltd., v. Official Assignee*, A. I. R. 1936 Mad. 907 : 165 I. C. 466.

(2) *Hindley v. Joy Narain Marwari*, A. I. R. 1920 Cal. 305 : 54 I. C. 439 : 46 Cal. 962.

S. 28 same has been held under the present Provident Funds Act of 1925 (1).
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The money of the provident fund is, however, exempt from attachment only in the hands of the Government or the institution which keeps and manages the fund. After the amount standing to the credit of a subscriber is paid to him and comes into his hands it ceases to retain its character of a 'compulsory deposit' and it becomes his property with which he can deal in any manner he likes, and is liable therefore to be attached in execution of decrees against him, or against which his creditors can proceed; and, for the same reason, it must vest in the receiver, if he is adjudicated an insolvent (2). In a Bombay case decided under the Act of 1897, it appears to have been held that money paid from a provident fund is exempt from attachment even after it has been paid and has come in the hands of the subscriber (3). This case has not been followed in subsequent cases mentioned above. Besides, the definition of a 'compulsory deposit' under the present Act of 1925 is different from that under the old Act. Section 2(a) of the new Act defines it in the following manner: 'Compulsory deposit' means a subscription to, or deposit in, a provident fund, which, under the rules of the fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance or the payment of subscription or premia in respect of a family pension fund, and includes any contribution and any interest or increment which has accrued under the rules of the fund on any such subscription, deposit or contribution and also any such subscription, deposit, contribution, interest or increment remaining to the credit of a subscriber or depositor after the happening of any such contingency." The contingency which is contemplated by the definition is usually provided for by the rules which the authority having the custody and administration of the fund is entitled to make in regard to the fund under the Provident Funds Act. Under the new Act the subscriber is entitled to receive payment of the sum standing to his credit even in his life-time, if the rules of the fund so permit. Under the old Act, however, no subscriber was entitled to payment during his life-time and section 3 of that Act only permitted payments being made after the death of the subscriber. Under the old Act, therefore, no question could arise as to whether money in the hands of a subscriber was liable to attachment or not for the simple reason that such a contingency could not arise. Under section 6 of the Provident Funds Act, Act 9 of 1897, (corresponding to section of the Act 9 of 1925) the provisions of the Provident Funds Act may be extended by a notification to funds established by corporations or local bodies (4). Books belonging to a lawyer who is insolvent are not exempt from attachment under S. 60, C. P. C. (5).

Property exempt from attachment and sale under other enactments.—The sub-section specifically mentions the Code of Civil Pro-

(1) *Wal Chand-Mola Ji Marwari v. Charles A. Williams*, A. I. R. 1935 Bom. 396: 59 Bom. 517: 159 I. C. 144; *Walter Edward Sheel*, In the matter of, 11 Rang. 93: 143 I. C. 771: A. I. R. 1933 Rang. 148.

(2) *Wal Chand-Mola Ji v. Charles A. Williams*, A. I. R. 1935 Bom. 396: 59 Bom. 517: 159 I. C. 144; *Gauri Shankar v. R. G. DeCruze*, A. I. R. 1927 Od. 22: 92 I. C. 673: 1 Luck. 313; *Ranganayaki v. Official Assignee*, A. I. R. 1931 Mad. 797: 134 I. C. 179: 61 M. L. J. 354.

(3) *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, A. I. R. 1920 Bom. 58 (2): 56 I. C. 450: 44 Bom. 673.

(4) *Seth Manna Lal v. Gainsford*, (1908) 35 Cal. 641: 12 C. W. N. 633.

(5) *Mangali Prasad v. Dr. Zaffar Hussain*, A. I. R. 1937 Oudh 127.

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cedure, 1903, but besides it any property which is exempt from liability to attachment and sale in execution of a decree by any other enactment does not also vest in the receiver. Under this heading we shall consider various provincial Acts which have imposed restrictions on alienations of agricultural land and also provide for its liability to attachment and sale in execution of money decrees against the owner of such land. Under the Punjab Alienation of Land Act, 1900, the land of a notified agriculturist is not liable to be sold in execution of a decree, but its attachment is not prohibited and such land can be temporarily alienated. The words used in sub-section (5) of S. 28, P. I. A., are "attachment and sale". Interpreting these words as meaning that in order that the sub-section may apply the property must be exempt from liability both from attachment as well as sale, it has been held by the Lahore High Court that the land of a notified agriculturist vests in the receiver (1). As such land vests in the receiver, it is, therefore, competent to the insolvency court to effect a temporary alienation by way of mortgage of the land of a member of an agricultural tribe who has become an insolvent (2). But where the land is not only not exempt from sale in execution of a decree under S. 16, Punjab Alienation of Land Act, but also is not liable for the debt under S. 9, Punjab Debtor's Protection Act it does not vest in the receiver (3). In a Lahore case the property of a member of an agricultural tribe was sold in insolvency and the sale proceeds were distributed among the creditors. The insolvent relying on these payments to creditors applied for discharge and was accordingly discharged. He, subsequently, long after the expiry of the period of limitation, filed an application to have the sale set aside on the ground that the land could not be sold under the Alienation of Land Act. It was held that the land could not be sold in insolvency but the application was refused on the ground of delay and equity (4).

The view of the Lahore High Court on the interpretation of the expression "attachment and sale" has not been followed by the Peshawar and the Allahabad Courts. In the Peshawar case, section 16 of the Punjab Alienation of Land Act was considered in relation to section 28, clause 5(5); and in the Allahabad case a similar provision of the Bundhelkhand Alienation of Land Act was considered (6). Under the Agra Tenancy Act the occupancy holding of a zamindar is exempt from attachment and sale; it does not vest in the receiver on the insolvency of a zamindar and the receiver cannot deal with it (7). Under section 73 (a), Bombay Land

(1) *Mirza v. Jhanda Ram*, A. I. R. 1930 Lah. 1034 : 130 I. C. 419 : 12 Lah. 367 ; *Jaimal v. Channammal Chauthmal*, 115 I. C. 475 : A. I. R. 1928 Lah. 734 ; *Manji v. Girdhari Lal*, 61 I. C. 664 : 2 Lah. 78 : 71 P. L. R. 1921 : A. I. R. 1921 Lah. 44.

(2) *Manji v. Girdhari Lal*, 61 I. C. 664 : 2 Lah. 78 : A. I. R. 1921 Lah. 44. Also see commentary under S. 60 of the Act.

(3) *Murad v. Hans Raj*, A. I. R. 1937 Lah. 618.

(4) *Jai Kishan Das v. Chiraghdin*, 142 I. C. 812 : A. I. R. 1933 Lah. 256. (The case is not reported in the authorised reports).

(5) *Bahadur Khan v. Official Receiver*, A. I. R. 1936 Pesh. 100 ; *Official Receiver, Dera Ismail Khan v. Abdulla Khan*, A. I. R. 1937 Pesh. 57.

(6) *Net Singh v. Receiver of the Estate of Gajrajsingh*, A. I. R. 1925 All. 467 : 47 All. 952 : 89 I. C. 488 ; *Hanuman Prasad v. Harakh Narain*, A. I. R. 1919 All. 10 : 42 All. 142 : 58 I. C. 551.

(7) *Sagarmal v. Girajsingh*, A. I. R. 1917 All. 10 : 39 All. 120 : 33 I. C. 171 ; *Kalka Das v. Gajju Singh*, 62 I. C. 897 : 43 All. 510 : A. I. R. 1921 All. 13 (F. B.) ; *Bhola Nath v. Chuni Lal*, 133 I. C. 479 : A. I. R. 1932 All. 41 ; *Raghunandan Singh v. Bhupalgir*, A. I. R. 1937 All. 399.

- S. 28** Revenue Act, an occupancy tenancy is not transferable and cannot be sold in execution of a decree; it does not therefore vest in the receiver (1).
(5). Under the Central Provinces Tenancy Act, occupancy rights of a tenant do not vest in the receiver (2). An insolvency court has, therefore, no power to lease out occupancy land even for the period of one year of an insolvent (3), nor a receiver can be appointed to manage an occupancy holding of such a tenant insolvent (4). Under the same Act if an owner of the *sir* land is adjudged insolvent, and an order is passed vesting his property in the receiver, he loses his proprietary rights in the *sir* land by the vesting order but he becomes the occupancy tenant of the *sir* land and is entitled to possession of the land as against the receiver (5). Occupancy rights under S. 6, P. T. A. do not vest in the receiver (6).

Vesting of personal earnings in the receiver.—Wages and other moneys earned by the bankrupt by means of his personal labour and exertion constitute his personal earnings. Neither under the British Act nor under the Indian Acts personal earnings have been exempted from vesting in the receiver by express provision. The rule that personal earnings necessary for the maintenance of the bankrupt and his family are so exempt has its origin in the common law of bankruptcy of England. In its early stages the rule was supposed to be that the personal earnings of a bankrupt, whether necessary for the maintenance of himself, his family and children or not, did not vest in the receiver. The law as it stands at present was laid down by the Court of Appeal in the leading case of *Re Robert* (7) in the following manner: "There is no authority for the proposition that the property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support, does not belong to his trustee. No such doctrine can be maintained in the face of section 44 (now section 38). After bankruptcy and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only that which is necessary for his support. He may sue for and recover these earnings if his trustee does not interfere, but what he recovers is for the benefit of his creditors except to the extent necessary to support himself, his wife and family."

The above is the statement of the English law. Under the Presidency-towns Insolvency and the Provincial Insolvency Acts, it is expressly provided, just as it was done in the English Act of 1883, that the after-acquired property of a bankrupt vests in the receiver. In cases under the Presidency-towns Insolvency Act, however, the English rule that such property does not vest in the receiver unless he intervenes (the rule which has got statutory recognition in section 47, B. A. of 1914) has been followed in India. And personal earnings acquired after adjudi-

(1) *Dharam Das-Thawar Das v. Sorabji*, 121 I. C. 876 : A. I. R. 1930 Sind 75.

(2) *Sita Ram v. Shaikh Sardar*, 13 N. L. R. 215 : A. I. R. 1917 Nag. 117; 42 I. C. 710.

(3) *Ghanasham v. Yoowarj*, A. I. R. 1934 Nag. 231; *Vithoba v. Keshorao*, A. I. R. 1937 Nag. 242.

(4) *Shri Kishan v. Nagoba*, A. I. R. 1924 Nag. 158 : 76 I. C. 634.

(5) *Nagoba v. Zingarde*, 121 I. C. 54 : A. I. R. 1929 Nag. 338 : 26 N. L. R. 46; 12 N. L. J. 117.

(6) *Sohansingh v. Official Receiver, Sheikhupura*, A. I. R. 1937 Lah. 782.

(7) 1900, 1 Q. B. 122. See also *Re Graydon*, 1896, 1 Q. B. 417 and *Mercer v. Vanscolina*, 67 L. J. Q. B. 424.

cation will not, it is submitted, vest in the receiver under the Presidency-towns Insolvency Act whether they are necessary for the bankrupt's support or not, unless the official assignee intervenes. The English rule has however not been followed in cases under the Provincial Insolvency Act. It has been held in those cases that the English rule does not apply.

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(5).

The matter however does not rest there. Under the English law personal earnings so far as they are necessary for the support of the bankrupt and his family cannot be claimed by the trustee in bankruptcy in any case. In a Bombay case decided under the Indian Insolvent Act, it was held that the after-acquired property of an insolvent, whether it consists of salary, personal earnings or property of a different kind, is property which vests in the official assignee, but subject to the provisions of section 27 of that Act as to salary and pension and subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of the insolvent and his family and that the official assignee cannot claim such personal earnings at all unless and until the insolvent has accumulated a margin beyond what is required for an adequate support (1). As the Presidency-towns Insolvency Act follows its predecessor, the Indian Insolvent Act, and the English law generally more than the Provincial Insolvency Act does, it is submitted that the Bombay ruling is still good law under the Presidency-towns Insolvency Act. As regards cases arising under the Provincial Insolvency Act it is not yet settled as to whether the English rule as to personal earnings shall be followed or not. The point has not so far been considered in any reported case. As the English rule as to the vesting of after-acquired property till the trustee in bankruptcy intervenes has not been followed in interpreting and limiting the operation of section 28, sub-section (4), it is submitted that the Provincial Act should not be read subject to the unwritten rule as to personal earnings of England. In this connection attention may also be drawn to an Allahabad ruling (2) where the court refused to read S. 61, P. I. A., subject to the exceptions recognised in English cases. The omission to recognise this rule will not occasion any hardship, as under section 66 the court has a great discretion in making an allowance for the support of the bankrupt and his family. •

Personal earnings should be distinguished from profits of trade or business.—Personal earnings should be distinguished from profits of trade or business carried on by the bankrupt after his adjudication. There has always been a difference between personal earnings and the profits of a trade or business carried on by an undischarged bankrupt even though such profits were to a great extent due to the personal labour of the bankrupt, and such profits have always been held to pass absolutely to the trustee (3). Thus it has been held that the earnings of a surgeon-dentist (4), a surgeon-apothecary (5), a painter who supplies materials and labour (6),

(1) Donaghue, C. M. J. in the matter of, 19 Bom. 232.

(2) Narain Das Dori Lal v. Mihimal, A. I. R. 1934 All. 521 : 149 I. C. 935 : 56 All. 1041.

(3) Crofton v. Poole, 1 D. & A. B. 568 ; Elliott v. Clayton, 16 Q. B. 581 ; Re Dowling, 4 Ch. D. 689 ; Emden v. Carte, 17 Ch. D. 768 ; Re Rogers, 1894, 1 Q. B. 425.

(4) Re Rogers, 1894, 1 Q. B. 425.

(5) Elliott v. Clayton, 1851, 16 Q. B. 581.

(6) Re Dowling, 1877, 4 Ch. D. 689.

- S. 28** an architect who prepares and sells plans and employs clerks (1), a
(2). furniture broker who removes goods, employs men and vans and supplies packing cases (2), and of a surveyor and assessment specialist who carries on his business with a staff of clerks (3) are profits of trade or business. The earnings of a bone-setter, an actor or a singer are personal earnings for they depend entirely on the personal exertions of the insolvent and nothing else (4).

In order that particular moneys may come under the definition of personal earnings it is not necessary that there should be an element of periodicity attached to them (5). Thus a lump sum earned by an undischarged bankrupt carrying on business as a commission agent may be personal earnings (6).

Profits of trade or business vest in the receiver. It, however, depends upon the bankrupt to carry on any trade or business after his insolvency or not. He cannot be compelled to work and earn money for the benefit of his creditors (7). The assignees cannot let out the bankrupt; they cannot contract for his labour (8). The bankrupt, in other words, cannot be made 'the slave of the trustee' (9).

Vesting of rights of action.—In regard to the vesting of rights of action for breach of contract and in other cases, the following rules may be stated :—

(i) A right of action in respect of a tort or a breach of contract resulting in injuries wholly to the person or feelings of the bankrupt or to his credit, character and reputation does not pass to the trustee for his creditors but remains in the bankrupt. Thus a right of action for an injury caused by slander, by seduction of a child or servant (10), or by trespass to the premises where the damage done to the premises is merely nominal and is mainly caused to his person and his family (11), or a right of action for damages caused by the use of defamatory words in regard to the insolvent's credit and reputation has been held not to vest in the receiver (12).

(1) *Emden v. Carter*, 1881, 14 Ch. D. 768.

(2) *Crofton v. Poole*, 1880, 1 D. & A. B. 568.

(3) *Re Collins*, (1925) Ch. 556.

(4) *Re Rogers*, 1894, 1 Q. B. 425, p. 430.

(5) *Affleck v. Hammond*, 1912, 3 Q. B. 162.

(6) *Affleck v. Hammond*, 1912, 3 Q. B. 162; see *contra Jumasji v. Sorabji*, 1908, 10 B. L. R. 579.

(7) *Re Jones*, 1891, 2 Q. B. 231, 232; *Bailey v. Thurston & Co., Ltd.*, (1903) 1 K. B. 137, 145.

(8) *Chippendale v. Tomlinson*, 1785, 4 Doug. 318.

(9) *Cohen v. Mitchell*, 1890, 25 Q. B. D. 262, 268.

(10) *Beckham v. Drake*, 2 H. L. C. 579; *Howard v. Crowther*, 8 M. & W. 601; *Hill v. Smith*, 12 M. & W. 618; *Exp. Vine*, 8 Ch. D. 364; *Wilson and another v. United Counties Bank, Ltd.*, 1920, 1 A. C. 102.

(11) *Rose v. Buckett*, 1901, 2 K. B. 449.

(12) *Chairnai Wali Ram v. Sunday Times, Ltd.*, 140 I. C. 238; *A. I. R.* 1932 Sind. 33; *Cassim, D. K. & Sons v. V. M. Abdulrahman*, *A. I. R.* 1930 Rang. 289; 8 Rang. 441; 128 I. C. 369.

(ii) A right of action in respect of a tort or of a breach of contract resulting in injuries wholly to the estate of the bankrupt passes to the trustee for his creditors (1). S. 28
(2)

(iii) A right of action, whether in respect of a tort or of a breach of contract, resulting in injuries both to the estate and also to the person or feelings of a bankrupt, will be split and will pass so far as it relates to the estate to the trustee and will remain so far as it relates to the person or feelings of the bankrupt in him. The trustee and the bankrupt may bring separate actions to recover their appropriate damages or they can join as plaintiffs in one action in which case the damages will be assessed under two separate heads (2). Where the injury under either head results in damages, which if standing alone would be too remote to be recoverable, the party whose action is founded on that injury will have no enforceable claim. If the cause of action be such that the jury would be entitled to award vindictive damages *prima facie* it will remain in the bankrupt (3). Where a contract contains several conditions there may be separate causes of action (4).

(iv) In case of a contract for the personal labour of the bankrupt the right of action vests in the receiver, if the cause of action on account of the breach arose before bankruptcy (5). If the contract is unexecuted at the date of the bankruptcy, the right of action will not vest in the trustee but remain in the bankrupt, who can sue in respect of it (6).

Where a foreman engaged for a firm of type-founders for a term of seven years was dismissed before the expiration of the term and he was afterwards adjudged bankrupt, it was held that the trustee and not the foreman was entitled to sue for damages for wrongful dismissal (7). Similarly, where an agent employed to sell a property negotiates the sale before his insolvency, but the remuneration for his services is to be paid on completion of the sale, the receiver is entitled to the remuneration though the sale is not completed until after his discharge (8). Where an undischarged insolvent employed as a travelling agent for a firm under a contract made before the commencement of the insolvency was wrongfully dismissed after the commencement of the insolvency it was held that the undischarged insolvent could maintain an action against the firm, but the official assignee or receiver being entitled to the fruits of litigation was entitled to intervene and the court could on his application add him as a plaintiff in the suit (9).

(v) A right of action for maintenance of bankruptcy proceedings

(1) *Stanton v. Collier*, 23 L. J. Q. B. 116; *Cassim, D. K. & Sons v. V. M. Abdul Rahman*, A. I. R. 1930 Rang. 23; 8 Rang. 441; 128 I. C. 369; *Hashim Khan v. Koya Moideen Kaka*, 145 I. C. 835; A. I. R. 1933 Rang. 263; *Tribhovandas v. Abdul Ally*, 39 Bom. 568; 23 I. C. 506; A. I. R. 1915 Bom. 298.

(2) *Wilson & another v. The United Counties Bank, Ltd.*, (1920) 1 A. C. 102; and see *Beckham v. Drake*, 2 H. L. C. 579, pp. 629, 634.

(3) *Brewer v. Dew*, 11 M. & W. 625; *Clark v. Calvert*, 8 Taunt 742.

(4) *Belcher v. Campbell*, L. R. 8 Q. B. 1; *Castelli v. Boddington*, 1 E. & B. 66.

(5) *Beckham v. Drake*, 2 H. L. C. 579.

(6) *Bailey v. Thurston & Co., Ltd.*, 1903, 1 K. B. 137.

(7) *Beckham v. Drake*, 1849, 2 H. L. C. 579; 9 E. R. 1213.

(8) *Re Byrne*, 1892, 9 Moore 213.

(9) *Bailey v. Thurston & Co., Ltd.*, 1903, 1 K. B. 137.

- S. 28 (2). (if any) would pass to the trustee (1). The right of a lessee to be released from a forfeiture vests in the trustee, who can sell such right and assign it to a purchaser (2). The right to be indemnified against the covenants of a lease under a covenant by an assignee from the bankrupt vests in the receiver (3). The right to get a money decree passed against a person set aside on the ground of fraud ceases to be exerciseable by him on his insolvency but passes to the official assignee (4). A bankrupt has no right of action for maintenance against a person who intervenes in proceedings against his trustee in bankruptcy in which the bankrupt was not personally a party (5).

The above paragraphs on the vesting of rights of action in the receiver should be read subject to the exemption which has been made by S. 60, C. P. C., in regard to contingent rights and mere rights to sue for damages. It has already been dealt with ; see pages 229-230.

Rights which are not transferable by their very nature.—The municipal licenses which are personal and not transferable cannot form assets available for distribution in the insolvency of the licensee (6). The result in the case of a member of the Bombay Native Share and Stock Brokers' Association who has lost his membership for being a defaulter is that he loses all interests both in the property of the association and in his card. In such a case no interest is reserved in the defaulter's card except to members of the association who have suffered by his lapse, or to the association itself. This is the result of rules 18, 56, 57 and 62. The defaulting member himself has no interest in the result of the sale provided for under these rules nor can he require a sale to be made. The rules are there for the benefit of his "Exchange creditors" and are doubtless enforceable at their instance. In the case of a defaulting member who is expelled from the association no interest in his card remains in himself and so none can pass to his assignee whether his expulsion does or does not take place prior to the commencement of his insolvency (7). An insolvent was discharged after declaration by the receiver that there were no assets of the insolvent which were capable of realisation. The insolvent had mortgaged his rights in certain property which the receiver considered worthless. After his discharge, the insolvent disposed of the mortgagee rights to one K who brought a suit to enforce the mortgage. Upon objection by the heirs of the mortgagors it was held that, after the receiver had abandoned the mortgagee rights as worthless, the insolvent became entitled to deal with them after the order of discharge and the transfer was not bad (8).

(1) *Metropolitan Bank v. Pooley*, 10 A. C. 210; *Boaler v. Power*, 2 K. B. 229.

(2) *Howard v. Fanshawe*, 1895, 2 Ch. 581.

(3) *Re Perkins*, 1898, 2 Ch. 182.

(4) *Rustomji Ardeshti Cooper v. Byramji Bomanji Talati*, A. I. R. 1934 Bom. 84 : 149 I. C. 910.

(5) *Bottomley v. Bell*, 31 T. L. R. 591.

(6) *Muttu Mohammadu v. Ramaswami Chetty*, 148 I. C. 858 : A. I. R. 1934 P. C. 1.

(7) *Official Assignee of Bombay v. K. R. Shroff*, A. I. R. 1932 P. C. 186 : 137 I. C. 776 : 59 I. A. 318 : 56 Bom. 374, affirming *Official Assignee of Bombay v. Shroff*, 55 Bom. 623 : A. I. R. 1931 Bom. 225 : 133 I. C. 821.

(8) *Sheo Nandan v. Kashi*, 39 All. 223 : 37 I. C. 878 : A. I. R. 1917 All. 302 (1).

Vesting of property situated outside British India under an order of adjudication passed by a British Indian Court.—See commentary under section 1, where the matter has been fully discussed. **S. 28**
(2).

General Rules to which the vesting is subject—The effect of an order of adjudication is to divest the insolvent of all his rights in his property and vest them in the trustee. The rights of the trustee in the property of the bankrupt are however subject to certain general rules, the principal of which are the following :—

1. The trustee's title is no better than the bankrupt's. The trustee takes as a rule a title no better than the bankrupt's. In every system of law there is an official, be he called an assignee or a trustee, or by any other name, who by force of the statute is invested with the bankrupt's property. But the property which he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens (1). Thus if the property is subject to a right of pre-emption by virtue of a custom, the official assignee or receiver takes it subject to that right (2). If the property had been mortgaged by the insolvent, the receiver takes it subject to the rights of the mortgagee including the right to enter into possession of the mortgaged property in default of payment of the mortgage debt (3). Where the insolvent had at the time of purchase of certain property agreed with the vendor to remove certain *chhatta* in a common land whenever the vendor required and the receiver sold the property of the insolvent, it was held that the purchaser was bound by the undertaking given by the insolvent (4). An unsatisfied judgment in detainee does not alter the property in the goods detained; the trustee of the defendant in such a case must deliver such goods to the successful plaintiff (5). The trustee cannot retain the goods unless the plaintiff elects to take bankruptcy proceedings for the assessed value (6) or has shown by his conduct that he has given up his rights in the goods and confined his claim to its value only. The trustee cannot, like the bankrupt himself, sue on an illegal contract (7) made by the bankrupt or a contract which is void under the law (8). A contract entered into by the bankrupt for the sale of specific goods, in a proper case, may be specifically enforced against the receiver (9). But where after but without notice of adjudication the purchaser paid the price to the bankrupt the trustee was held not to be bound to convey the property except on the terms of the

(1) *Sheobran Singh v. Kulsum-un-nissa*, 1927, 54 I. A. 204 : 49 All. 367 : 101 I. C. 368 : A. I. R. 1927 Privy Council 113.

(2) *Sheobran Singh v. Kulsum-un-nissa*, 1927, 54 I. A. 204 : 49 All. 367 : 101 I. C. 368 : A. I. R. 1927 Privy Council 113.

(3) *Hobson v. Gorrington*, 1897, 1 Ch. 182 ; *Monti v. Barnes*, 1901, 1 K. B. 205 ; *Ellis v. Glower*, 1908, 1 K. B. 388 ; *Bagnall v. Villah*, 1879, 12 Ch. D. 812 ; *Official Assignee v. Fakirji Cowasji*, 123 I. C. 297 : A. I. R. 1930 Sind 77.

(4) *Nand Gopal Das v. Batuk Prasad Gupta*, 133 I. C. 541 : 54 All. 17 : A. I. R. 1932 All. 78.

(5) *Brinsmead v. Harrison*, L. R. 7 C. P. 547 ; *Exp. Drake*, 5 Ch. D. 866 ; *Re. Gunsbourg*, 1920, 2 K. B. 426.

(6) *Re A Debtor*, 14 Mans. 198.

(7) *Richardson v. Gooch*, 5 E. and B. 999 ; *Re. Mapleblack*, 4 Ch. D. 150.

(8) See *Shoolbred v. Roberts*, 1900, 2 Q. B. 497.

(9) *Pearce v. Bastable's Trustee*, 1901, 2 Ch. 122 ; *Re. Wait*, 1926, 1 Ch. 962.

5. 28 purchaser paying the purchase money to the trustee (1). Where the
 (2). vendor has forwarded the goods under a mistake, the trustee of the supposed vendee must restore the goods or pay the amount due to him (2). A vendor induced by the fraud of the bankrupt to sell and deliver goods to the bankrupt is entitled on discovering the fraud to disaffirm the contract if he does so within a reasonable time and to retake possession, even though he has notice of an available act of bankruptcy, the trustee's title being subject to the right of the vendor to disaffirm the contract and retake possession (3).

Ordinarily, however, in the case of a sale where the property in the goods has passed to the vendee and the vendee becomes bankrupt, the remedy of the vendor is to prove for the price only and he cannot claim the goods (4).

2. The trustee takes the property subject to the equities arising in respect of property augmented or benefited at the expense of third persons since the date to which the trustee's title relates back, with the consent or at the implied request of the bankrupt. Thus where a person pays off a distress on the bankrupt's property or in order to prevent a distress, pays any amount to any person, such a person is entitled to be repaid out of the estate before the creditors receive a dividend (5). Thus where a banking account was kept in the name of the bankrupt's, wife and the bankers, without notice that the moneys were the bankrupt's, paid the wife's cheques after the receiving order but before a declaration that the account really belonged to the bankrupt, the court refused to order them to pay the amount of the cheques to the trustee (6). But an assignee under an agreement void against the trustee who had had to pay rent under the agreement is at the most entitled to prove for the amount so paid (5).

3. Similar to the preceding rule is the rule that the trustee cannot avoid a transaction of which he has taken the benefit. Where the trustee has received the proceeds of sale, he cannot treat that sale as tortious and sue the seller in trover (8). Nor can he when he has in the bankruptcy proceedings treated a bill of sale as valid and thereby gained an advantage, afterwards allege that the bill of sale is invalid (9). Where he has recovered from the bankrupt's bankers money received by them and paid over to a creditor with knowledge of an act of bankruptcy, he cannot again recover the same sum from the creditor (10). Similarly a

(1) *Exp. Rabbidge*, 8 Ch. D. 367. *cf.* *Powell v. Marshall*, *Parkes & Co.*, 1899, 1 Q. B. 710; *Re Taylor*, 1910, 1 K. B. 562; *Re Wilson*, 1926 Ch. 21 and *Re Gaugh*, (1927) B. and C. R. 137.

(2) *Exp. Barnett*, 3 Ch. D. 123. See also *Re Reed*, 1876, 3 Ch. D. 123.

(3) *Re Eastgate*, 1905, 1 K. B. 465; *Tilley v. Bowman, Ltd.*, 1910, 1 K. B. 745.

(4) *Exp. Whitaker*, L. R. 10 Ch. 446.

(5) *Exp. Kennard*, 21 L. T. 684; *Re Craig*, 1916, 2 K. B. 497; *Exp. Elliott*, 3 M. and A. 664.

(6) *Re Montague*, 4 Mans 1.

(7) *Exp. Chaplin*, 26 Ch. D. 319.

(8) *Smith v. Hodson*, 2 Smith's L. C., 13th Edition, 140; *Brouwel v. Sparrow*, 7 B. and C. 310.

(9) *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347.

(10) *Vernon v. Hanson*, 2 T. R. 287.

trustee cannot, after obtaining an order declaring a sale fraudulent and void as against himself and ordering payment to himself of the proceeds of a previous sale of the goods comprised therein, afterwards bring an action of trover against the assignees under the bill of sale to recover the difference between the value of the goods and the amount realised by the sale (1).

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4. The receiver is to do what is honourable. Rule in *Ex parte James*. The trustee is an officer of the court and he will be ordered to do fullest equity, and, in certain cases, an even higher standard of conduct is imposed on him, *i. e.*, the receiver will be ordered to do what is just in point of honesty and morality, even apart from the fact that he is not legally bound to do so. The principle is an old one and had been accepted in very early times (2). The rule is generally referred to as the rule in *Ex parte James* (3). In that case it was held by the Court of Appeal in England that the trustee in bankruptcy to whom an executing creditor had paid over the fruits of his execution under a view of the law, which a decision of the Court of Appeal given shortly afterwards showed to have been erroneous, must refund the money so paid under a mistake of law to the creditor. The principle has arisen from the disciplinary control exercised by the court over its officer in the administration of the estate under its directions. As it operates in a field not covered by the established rules of law and equity and as it is incapable of reduction to an exact legal formula it must in its application be governed in part by ethical considerations. Legal rights can be determined with precision by authority, but questions of ethical propriety have always been and will always be the subject of honest differences amongst honest men (4), but that is not an adequate reason for discarding honesty altogether (5). The rule in *Ex parte James* has been applied to cases where the money was paid under a mistake of law (6). But the principle is not confined to such cases only, it having been based on a much broader principle. The most important case where it was so extended is *Re Thellusson* (7). The facts were as follows: A bankruptcy notice and a petition had been served on the debtor who knew of the date fixed for the hearing of the petition but who did not attend the hearing and did not know the fact that a receiving order had been made. The day following the making of the receiving order, the debtor borrowed from the applicant, a young officer in the Army, who knew nothing of the bankruptcy proceedings, the sum of nine hundred pounds which was paid direct into the debtor's banking account, where it was automatically extinguished and overdrawn, the balance coming into the hands of the official receiver. On these facts it was held by the Court of Appeal that, even if the applicant had no legal right to recover the money, the official receiver ought to refund the money to him, on the ground that in point of moral justice and honest dealings he could not retain it for distribution among his creditors. In this case there had been no payment to the official receiver under a mistake of law and no act or omission by him

(1) *Smith v. Baker*, L. R. 8 C. P. 350.

(2) *Schondler v. Wace*, 1808, 1 Camp. 436.

(3) L. R. 9 Ch. 609.

(4) *Re Wigzell*, 1921, 2 K. B. 835, *per Salter*, J. at 845.

(5) *Re Thellusson*, 1919, 2 K. B. 735, *per Atkin*, L. J. at p. 764.

(6) *Exp. Simmonds, Re Carnac*, 16 Q. B. D. 308; *Re Brown*, 32 Ch. D. 597; *Re Rhoades*, 1899, 2 Q. B. 347.

(7) (1919) 2 K. B. 735.

- S. 28** which had resulted in the particular fund reaching his hands. At the same time it is clear that holding otherwise would have resulted in a fund derived from an innocent third party left without even a right of proof in the bankruptcy becoming available for distribution among creditors who could show no title thereto under any moral process whatever. There are other cases also in which there was no mistake of law and yet the principle was applied. Before his bankruptcy a debtor had charged two policies of insurance on his life to his banker to secure a loan, and at his request his wife had paid the premiums due immediately before his bankruptcy, and continued to pay all the subsequent premiums and the interest on the loan down to the date of his death when the policy money was paid to the mortgagees, who having deducted the amount of their debt, paid the balance to the official receiver, from which balance the wife claimed to be entitled to recoup herself the amounts she had actually paid in premiums and interest on the loans. It was held on these facts that the official receiver should pay the premiums and interest to the wife out of the balance (1). Where a testatrix bequeathed to her husband, who subsequently became bankrupt and who was the sole executor and trustee of her will, certain articles of jewellery absolutely but before her death she informed him that she had written a letter, to be opened after her death, containing certain directions relating to the jewellery, which directions the husband promised to observe, it was held that, whether the letter created a valid trust or not, the trustee in bankruptcy of the husband should only take the jewellery after the gifts of specific articles contained in the letter had been satisfied (2). Where between the receiving order and adjudication a bankrupt by consent of the assistant official receiver proceeded with the promotion of a boxing contest without interference and in pursuance of the arrangement with that officer was paid moneys by ticket agents, and, after deducting expenses, paid the balance of these moneys to the trustee, it was held that even if the trustee was not bound by the acts of the assistant official receiver, it would be unjust and inequitable to permit the trustee to recover the moneys afresh from the ticket agents (3). Where a testate bankrupt accumulated sums in a bank out of his personal earnings, incurred debts in the ordinary course of living and then died, whereby his executors incurred funeral expenses, it was held that the official receiver should pay creditors for necessities not paid for, and pay the executors their reasonable funeral expenses in full out of the sums so accumulated (4). The principle was applied in a Rangoon case, where a certain company was found to possess a moral or equitable claim to a certain sum of money in the hands of a receiver (5).

Cases in which the principle was not applied.—Where the mortgagees of two fishing boats belonging to a debtor charged to secure present and future advances offered to pay the creditors a composition, which the majority accepted, and afterwards paid it to the assenting creditors with notice of an available act of bankruptcy under the mistaken belief that they were entitled to add the amount so paid to their security, which amounts after the sale of the boats and the bankruptcy of the debtor they

(1) *Re Tyler*, (1907) 1 K. B. 865.

(2) *Re Bell*, 99 L. T. 939.

(3) *Re Wilson*, (1926) Ch. 21.

(4) *Re Walter, Slocock v. Official Receiver*, 1929, 1 Ch. 647.

(5) *C. Choung Taik v. Ma Thein Nu*, A. I. R. 1931 Rang. 74 (2) : 8 Rang. 665 : 131 I. C. 504.

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claimed to retain from its proceeds, in addition to the amount of their debts properly covered by the mortgage, it was held that the principle had no application (1). Where a debtor whose affairs were being liquidated by arrangement under the Act of 1869, and who had a short time previously effected and paid one premium on a policy of insurance which at the date of the insolvency had no surrender value, did not disclose the existence of the policy, but continued to keep up the premiums after the close of the liquidation for a period of 27 years until his death, it was held by the Court of Appeal, that the debtor's legal personal representative had no claim, legal, equitable or moral, against the official receiver for a return of the amount of the premiums so paid (2). A debtor during the liquidation of his affairs effected a policy of insurance, the existence of which was not disclosed to the trustee in the liquidation but the premiums on which were paid by the debtor until he obtained his discharge out of an allowance made to him by the trustee for assistance rendered in carrying on the business. On these facts it was held that, there being no knowledge on the part of the trustee, the official receiver was entitled to the proceeds of the policy without making any allowance to the executrix of the debtor for the premiums (3). A receiving order having been made against a debtor, a stay of advertisement and for the proceedings was granted pending the hearing of the appeal which was ultimately dismissed and the debtor adjudged bankrupt. Between the date when the receiving order was made and the date when it was advertised the debtor paid in certain sums to draw out certain sums from his account with his bankers, who were throughout ignorant of the bankruptcy proceedings. The trustee in bankruptcy subsequently claimed from the bank the amounts paid in to the credit of the account without allowing the bank credit for the amounts withdrawn during this period. It was held by the Court of Appeal that it was not contrary to natural justice or unconscionable to allow him to do so and to claim the full benefit of his statutory rights (4). Where a trustee was bringing an action against a book-maker on cheques previously given him for betting losses, it was held that the trustee was merely enforcing a right of action and that there was no room for the application of the principle (5). It will appear from the cases noted above that it is not always easy to apply the principle, and that there can be and have been honest differences of opinion as to what may be honourable for the official receiver in a particular instance. One thing is however certain that the principle is a sort of prerogative of mercy reposed in the court to alleviate particular cases of unusual hardship in which a regard to strict legal or equitable rights only would work manifest injustice. It is not a rule of general application indistinguishable from a rule of law.

The above principle has also been extended to questions of proof. Where a firm of solicitors who became bankrupt had received from their clients money which included payment on account of counsel's fees, the Commissioner directed the assignees to admit a proof of the barrister for

(1) *Re Hall*, (1907) 1 K. B. 875.

(2) *Tapster v. Ward*, 101 L. T. 502.

(3) *Re Stockes*, (1919) 2 K. B. 256; See also *William's*, page 233.

(4) *Re Wigzell*, (1921) 2 K. B. 835.

(5) *Scranton's Trustee v. Pears*, 1922, 2 Ch. 57.

- S. 28 the amount of his unpaid fees which had actually been received by the
(2). bankrupt (1).

Insolvent's position after adjudication.—On the making of an order of adjudication the whole of the property belonging to the insolvent vests in the receiver and for all purposes it is the receiver who represents the insolvent in regard to his property and rights of action. Two results follow from it. Firstly the insolvent ceases to represent his estate and he cannot do anything in respect of his property which so vests in the receiver as to bind him. The second is that in any matter affecting the insolvent's property the proper person to represent the insolvent is the receiver. From the first proposition it is clear that no cause of action in a suit or proceeding affecting the insolvent's property survives on the adjudication of the insolvent and if the receiver declines to defend a suit or appeal from an order passed against the insolvent in such a proceeding affecting property, the insolvent cannot do so independently of the receiver (2). The right to set aside a money decree passed against a person on the ground of fraud ceases to be exercisable by him on his insolvency but passes to the official assignee (3). In a Bombay case it was however held, having regard to the special facts of that case, that if during the pendency of a suit a party is adjudicated insolvent, he is not disqualified by reason of his insolvency from appealing and that after the annulment of the order of adjudication he is entitled to continue the appeal (4).

The above disability of the insolvent to prosecute or defend pending suits or proceedings results only in respect of property which vests in him, but not in respect of that which does not vest (5).

Section 28, sub-section (2) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceedings by a creditor but there is no specific provision in the Act under which a suit by an insolvent after his adjudication is in express terms prohibited. Section 59 (d) implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the receiver, the receiver alone is the proper person to institute suits and proceedings ; a suit brought by an insolvent behind the back of the

(1) *Re H. and C. Hall*, 12 Jur. N. S. 1076. Also see *Exp. Colquhoun, re Clift*, 38 W. R. 688 and *Wells v. Wells*, (1914) P. 157 : 83 L. J. P. 81.

(2) *Tribhovan Das v. Abdul Ally*, 39 Bom. 568 : 28 I. C. 506 : A. I. R. 1915 Bom. 298 ; *Munilal v. Bari Doab Bank*, A. I. R. 1936 Lah. 176 : 161 I. C. 151 ; *Rajendra Chandra Sarkar v. Bipinchandra Shah Bhaymik*, A. I. R. 1934 Cal. 64 : 60 Cal. 1289 : 149 I. C. 399 ; *Phani Bushun Dasu v. Sashi Bhushan Maity*, A. I. R. 1935 Cal. 391 : 156 I. C. 401 ; *Sayad Daud v. Mahomed*, 95, I. C. 538 : A. I. R. 1926 Bom. 366 ; *Shyam Sarup v. Nand Ram*, 63 I. C. 366 : 43 All. 555 : A. I. R. 1921 All. 232.

(3) *Rustomji Ardeshti Cooper v. Byramji Bomanji Talati*, A. I. R. 1934 Bom. 84 : 149 I. C. 910.

(4) *Ram Chandra Genji v. Shripathi Sukaji*, 118 I. C. 252 : A. I. R. 1929 Bom. 202.

(5) *Haji Sargand Gul v. Swami Dass*, A. I. R. 1937 Pesh. 42 ; *Balaji. Sao v. Anand Prashad*, 103 I. C. 131 : 23 N. L. J. 66 : A. I. R. 1927 Nag. 217.

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receiver would be defective (1). In every case, however, before an insolvent be held incompetent to continue the proceedings or maintain a suit, the court should be satisfied that the property affected by the suit or the proceedings has vested in the receiver. An appropriate course would seem to be to implead the official receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Thus it has been held that where an insolvent filed a suit for money lent after adjudication the defendant who took the money from the plaintiff should not be allowed to deny that the money belongs to the plaintiff and that *prima facie* there is no presumption that the money does not belong to the plaintiff and till the receiver has not intervened and seized this amount there is a presumption in favour of the plaintiff that the money is his own and the suit cannot be thrown out on the mere ground that the plaintiff is an insolvent (2).

Just as the insolvent has no right to commence or prosecute proceedings affecting his property which vests in the receiver, in the same way all transactions between an insolvent and the creditor conducted behind the back of the official assignee must be considered as not binding on the latter (3). Thus it has been held that where a person who had obtained a decree against another for a monthly family allowance was adjudicated an insolvent the decree became vested in the receiver as from the date of adjudication and all payments alleged to be made by the judgment-debtor to the insolvent after the said date and which were not certified to the court under O. 21, r. 2 (3), C. P. C., could not be recognised against the receiver by the executing court (4).

Such transactions are, however, not absolutely null and void. They are only voidable against the receiver; otherwise they are perfectly valid and bind the insolvent himself (5). Thus it has been held that an insolvent can be sued upon on a mortgage executed by him during his insolvency after his discharge when the property reverts in him (6). Similarly a judgment-debtor cannot have a sale set aside on the ground that the official receiver who was a necessary party was not included in the mortgage suit. The reason is that the official receiver may not be bound by the sale but the judgment-debtor is (7).

(1) Sripada Venkatasubbarao v. Namagiri Venkateswaralu, A. I. R. 1937 Mad. 165.

(2) Abdul Rahaman v. Nihal Chand, A. I. R. 1935 All. 675 : 157 I. C. 41.

(3) Mohan Lal Moti Lal Shah v. Hari Lal Bhogi Lal Shah, 87 I. C. 929 : 27 B. L. R. 419 : A. I. R. 1925 Bom. 346 ; Rostamji Dhanju Mehta v. Madan Mohan, 39 I. C. 884 : A. I. R. 1917 Patna 229.

(4) Nilkamta Subudhi v. Rama Chandra Deo, 137 I. C. 394 : A. I. R. 1932 Mad. 250.

(5) Rup Narian Singh v. Hargopal Tewari, 55 All. 508 : 143 I. C. 836 : A. I. R. 1933 All. 449 ; Inamullah Khan v. Shambhu Dayal, 130 I. C. 485 : A. I. R. 1931 All. 159 ; Diwan Chand v. Nanak Chand, 16 Lah. 392 : 155 I. C. 938 : A. I. R. 1934 Lah. 899 ; Jagmohan Lal v. Mst. Gomti, 146 I. C. 494 : A. I. R. 1933 All. 153.

(6) Rup Narain Singh v. Har Gopal Tewari, *supra*.

(7) Innamullah Khan v. Shambhu Dayal, 130 I. C. 485 : A. I. R. 1931 All. 159.

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Following the Allahabad rulings it has been held by the Lahore High Court that partition of property in which an insolvent had a share is not valid if the receiver in whom that share is vested is not a party to that partition ; but if the receiver does not claim it in the insolvency proceedings the partition would be binding upon the parties after the discharge of the insolvent (1). In a Patna case where the judgment-debtor was a party to the execution proceedings and was apprised of the assignment of the decree by the decree-holder who was adjudged insolvent, in favour of a private person as well as of the application of the transferee to be substituted in place of the original decree-holder and to carry on the execution and he raised no objection at the time and the official assignee had not taken any steps to take possession of the decree and executed it himself, it was held that the judgment-debtor could not object to the execution and say that the official assignee only was entitled to execute the decree (2). Where, subsequent to adjudication as insolvent, a government servant incurs debts, and creditors obtain decrees against him and subsequently the adjudication is annulled but the official receiver has not availed himself of section 28 (4), the decree-holders can proceed against salary obtained by him after the order of annulment (3). Where a person after being adjudicated insolvent endorses a pronote in his favour to another, and his insolvency petition is subsequently dismissed, the property reverts in him from the date of adjudication, the assignment is valid and the assignee can sue on it (4). During the pendency of a suit by a widow against her husband's father, A, for present as well as future maintenance, A was adjudicated insolvent on the application of a creditor. The official receiver was added as a party defendant No. 2. The widow alleged that the insolvency proceedings were collusive. The lower court passed the decree in her favour declaring that the maintenance was a charge on property held by A. A appealed against that decree making the receiver also a respondent. In appeal the widow contended that after the vesting of the estate in the official receiver A had no *locus standi* to appeal against the decree. It was held that the decree was, as it stood, a personal decree against A, though there was also the declaration of a charge and therefore the objection under S. 59, P. I. A. was not well founded. It was further held that the case was not one within the terms of O. 22, r. 8, C. P. C., because A did not become an insolvent during the pendency of the appeal and the scope of the suit was not one which an assignee or receiver might maintain for the benefit of the creditors, though the appeal, if successful, may incidently benefit them, O. 22, r. 10, that C. P. C. was only permissive and did not impose any disability on a person already on record and therefore the appeal by A was competent (5).

When the consent of the heirs of a Mohamaden is signified to a bequest in a will in favour of an heir the legatee takes from the testator

(1) *Diwan Chand v. Manak Chand*, 16 Lahore 392 : 155 I. C. 938 : A. I. R. 1934 Lah. 809.

(2) *Mahesh Prasad Khatri v. Smith*, A. I. R. 1933 Patna 130 : 146 I. C. 889.

(3) *Secretary of State v. Ishardas*, A. I. R. 1936 Lah. 761.

(4) *Bhyrahewanhalli Lingappa v. Official Receiver*, Bellary A. I. R. 1937 Mad. 717.

(5) *Dandamudi Rama Ranyubu v. Dandamudi Sitalakshamanna*, A. I. R. 1937 Mad. 915.

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and the consent does not operate as a transfer by the heirs signifying their consent. Where the consenting heirs are insolvent their consent is equally effective in validating the bequest and the property vests in the legatee and not in the receiver (1).

As the receiver completely and effectively represents the estate of the insolvent, it is obvious that he is a necessary party in a suit or proceeding affecting such property. The leading Indian case is *Kala Chand v. Jagan Nath* (2). This case has been discussed at length under subsection 6. It was held by the Privy Council that in a mortgage suit the receiver is a necessary party. This case has been followed by the Indian High Courts in subsequent cases (3). Even before the Privy Council case referred to above, it was held in some cases that the official receiver is a necessary party in a suit affecting the insolvent's property (4). If a person is adjudged insolvent pending a suit, there is a devolution of interest as contemplated by O. 22, r. 10, C. P. C. ; S. 22 (1), Limitation Act, has no application to such a case as bringing the official receiver on the record does not amount to adding a new plaintiff or defendant within the meaning of that section.

The official receiver is a necessary party in the suit if it relates to the property of the insolvent. Where a suit is brought against a debtor in respect of money due, *i. e.*, a debt or damages for breach of contract, and he becomes insolvent, the suit is not one relating to the property of the insolvent and the official assignee or receiver is neither a necessary nor a proper party to the suit (5).

A Bombay ruling where it was held that the right to set aside a money decree passed against a person on the ground of fraud ceases to be exerciseable by him on his insolvency but passes to the official assignee, appears to conflict with this view (6). The reason for the rule is that the receiver is not bound by a decree obtained by a creditor against the insolvent ; and that the only way in which the creditor can claim against his estate is by proving in insolvency.

Successive Bankruptcies.—The matter in England is governed by section 3 of the Bankruptcy (Amendment) Act, 1926, which was substituted for section 39 of the principal Act of 1914. It runs as follows :—

"(1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceed-

(1) *Aziz-un-nissa Bibi v. O. M. Chiene*, 42 All. 593 : 59 I. C. 296 : A. I. R. 1920 All. 243.

(2) 101 I. C. 442 : 54 Cal. 595 : A. I. R. 1927 P. C. 103. See also the remarks of their Lordships in *Sripat Singh Dugar v. Rai Hari Ram Goenka*, 74 I. C. 597 : A. I. R. 1922 P. C. 51.

(3) *Rajendra Chandra Sarkar v. Bepin Chandra Shaha Bhaumik*, A. I. R. 1934 Cal. 64 : 60 Cal. 1298 : 149 I. C. 399 ; L. W. Nasse, In the matter of, 118 I. C. 615 : 7 Rang. 201 : A. I. R. 1929 Rang. 229.

(4) *Mam Raj, v. Brij Lal*, 8 A. L. J. 1241 : 12 I. C. 587 ; *Davaraja Iyengar v. Thirumala Sami Naidu*, 32 I. C. 489 : A. I. R. 1917 Madras 98 ; *Ghulam Mahomed v. Karta Ram*, 51 I. C. 971 : A. I. R. 1919 Lahore 363 (1).

(5) *Balthazar v. Municipal Corporation, Rangoon*, A. I. R. 1935 Rang. 439 : 160 I. C. 90.

(6) *Rustomji Ardeshti Cooper v. Byramji Bomanji Talati*, A. I. R. 1934 Bom. 84 : 149 I. C. 910.

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(2). bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy.

“(2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of the deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the official receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of section forty-seven of this Act) vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be.

“(3) Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt or after his decease of a petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired by the bankrupt since he was adjudged bankrupt until the subsequent petition had been disposed of, and, if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.”

There is no express provision on the subject in both the Indian Acts. In a Calcutta case the principle underlying section 39 (1), English Bankruptcy Act, 1914, and the decision of the Court of Appeal in *Ex parte Pit* (1) were followed (2).

It is submitted that the English law as stated in the section quoted above will be followed in India on the ground that it is in accordance with justice, equity and good conscience.

Sub-section 2, second part.—Sub-section 2 of section 28 consists of two parts ; the first provides that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the court or receiver and shall become divisible among the creditors. The second provides that no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the court and on such terms as the court may impose. An order of adjudication has, therefore, two main effects ; one is to take away the property of the insolvent from his possession and control to be administered in the manner prescribed by the insolvency law for the protection of the general body of creditors. The other is that it takes away the rights of the creditors to proceed against the insolvent's estate in the ordinary manner and gives them the remedy to prove their

(1) 1882, 20 Ch. D. 303.

(2) J. M. Gregory, in *re*, A. I. R. 1928 Cal. 50 : 54 Cal. 858 : 106 I. C. 326. (A case under the Presidency-towns Insolvency Act.)

claims in insolvency (1). Both these provisions are enacted to promote a single object, that is, to bring the insolvent and his estate on the one hand and the claimants against the estate on the other, within the special jurisdiction of the insolvency court. We have considered the first part of the sub-section and now we proceed to deal with the second part.

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Applicability.—In order that the sub-section may operate as a bar to a suit, it is necessary that the following conditions should be fulfilled :—

1. The person bringing the suit should be a creditor ;
2. The suit should be in respect of a debt provable under this Act ;
3. The bar operates only during the pendency of the insolvency proceedings and not after their termination ; and
4. The suit should seek a remedy against the property of the insolvent.

From the construction of the sub section it appears that the words “during the pendency of the insolvency proceedings” and “against the property of the insolvent” are to be read as if they had occurred after the words “or commence any suit or other legal proceeding” *also*. It would thus mean that the suit or other legal proceeding is barred only if it is aimed at against the property of the insolvent and is commenced during the pendency of the insolvency proceedings. This construction has been overlooked or not followed in a few cases which we will discuss later on.

Rights of persons other than creditors not barred.—A stranger to the insolvency proceedings is not required to obtain the leave of the court before bringing an action in respect of a property seized by the receiver on the ground that it belonged to him and not to the estate of the insolvent (2). There is no statutory provision under which such leave is necessary ; whatever provision there is in the Act relating to the grant of such leave is confined to the claims of creditors (3). Nor leave is necessary on the ground that the receiver is an officer of the court. The rule that a suit should be instituted against a receiver with the previous sanction of the judge having charge of the proceedings in which the receiver had been appointed only applies where the receiver is appointed in an action, and does not apply to a receiver mentioned in the Provincial Insolvency Act, who is exactly in the same position as the trustee in bankruptcy in England (4). The insolvent's property vested

(1) *Paruchuri Venkataramayya v. Abburi Virayya*, A. I. R. 1936 Mad. 57 : 160 I. C. 423.

(2) *Rura v. Official Receiver, Amritsar*, 125 Ind. Cas. 625 : A. I. R. 1930 Lab. 703.

(3) *Mt. Maharana Kunwar v. E. V. David*, 77 Ind. Cas. 57 : 46 All. 16 : A. I. R. 1924 All. 40 ; *Halima v. Mathradas Ramachand*, 40 I. C. 122 : A. I. R. 1917 S. 22.

(4) *Sant Prasad Singh v. Sheodutt Singh*, 77 Ind. Cas. 589 : 2 Pat. 724 : A. I. R. 1924 Pat. 259 ; *Amrit Lal Chose v. Narain Chandra Chakrabarti*, A. I. R. 1919 Cal. 781 : 53 I. C. 973 ; *Halima v. Mathradas Ramachand*, 10 S. L. R. 879 : 40 I. C. 125 : A. I. R. 1917 Sind 22.

- S. 28** in the official assignee is not in *custodio legis* and there is no contempt of court in instituting a suit against that officer with respect to that property (1).

In respect of any debt provable under this Act.—Even the right of a creditor of the insolvent to commence any suit or other legal proceeding is barred under the section only if the suit or legal proceeding is in respect of a debt provable in bankruptcy. Thus it has been held that a suit in respect of an obligation incurred by an insolvent after the date of his adjudication not being a provable debt is not barred by the section (2). A suit brought on a promissory note executed by the manager of a joint Hindu family impleading all the members of the family, including the insolvent and the official receiver, is unsustainable against the insolvent and the official receiver because the debt is one provable in insolvency but it can be decreed against other defendants on its being proved that the debt was incurred on behalf of the family and can be realised from their shares of the family property (3).

During the pendency of insolvency proceedings.—The bar imposed by the section operates only during the pendency of the insolvency proceedings. The expression has not been defined in the Act and there is no express provision that insolvency proceedings terminate after a particular act or order has been done or made by the insolvency court. It was held by the Chief Court of Lower Burma (4) and by the Rangoon High Court (5) that an order of refusal of discharge terminates the insolvency proceedings. This view has however not been accepted as correct by the same High Court in two other cases (6). The ground of the subsequent decisions was that on the refusal of the insolvent's discharge his property does not re-vest in the insolvent, and the insolvent can renew his application for discharge in case fresh circumstances justify him in doing so. The Madras High Court has also ruled that a refusal under S. 42, P. I. A., 1920, of final discharge does not *ipso facto* determine the insolvency proceedings. When the assets of the judgment-debtor are not vested in him or under his control and when the official receiver is still holding them for the benefit of the judgment-debtor's creditors an order of refusal of final discharge is not in itself necessarily final (7). It was further ruled in the same case that if a court intends to bring the insolvency pro-

(1) *Ramalinga Chetty v. Ananta Chariar*, (1913) M. W. N. 287; 13 M. L. T. 303; 18 I. C. 722; 24 M. L. J. 350.

(2) *Ganga Prasad v. Fidaali Chandabhai*, 48 I. C. 913; A. I. R. 1918 Nag. 197.

(3) *Karnati Buseddulagari Chinna Veeriah v. Yerrabhothula Gurivi Reddi*, A. I. R. 1934 Madras 223; 148 I. C. 831.

(4) *Koshwe Gya*, In the matter of, 38 I. C. 519; A. I. R. 1917 L. B. 16 (2).

(5) *Maung Po Toke v. Maung Po Gyi*, A. I. R. 1926 Rang. 2; 3 Rang. 492; 92 I. C. 142; see also *A. K. R. M. S. Chettyar firm v. Daw Pwa Thet*, A. I. R. 1936 Rang. 2, where a conditional order of discharge was held to conclude insolvency proceedings.

(6) *Rowe & Co., v. Tan Thein Teik*, A. I. R. 1925 Rang. 105; 2 Rang. 643; 84 I. C. 909; *Tan Seik Ke v. C. A. M. C. T. Firm*, A. I. R. 1928 Rang. 109; 6 Rang. 27; 109 I. C. 769.

(7) *Alamelu Ammal v. Venkata Rama Iyer*, 105 I. C. 165; 50 Mad. 977; A. I. R. 1927 Mad. 919.

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ceedings to an end and restore the *status quo ante* the insolvency it must annul the adjudication. Here it will be just proper to note that an order of adjudication is annulled on more than one ground and an annulment of an order of adjudication also need not necessarily terminate the insolvency proceedings. In any event the operation of an order suspending the insolvent's discharge is different from that of one refusing a discharge. The effect of the former is that permission of the insolvency court is required to institute a suit against the insolvent (1). The death of the insolvent does not terminate insolvency proceedings and they can be continued under section 17 of the Act (2). In a Sind case it was remarked that insolvency proceedings will be considered as pending where the receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge (3).

Subsequent to the adjudication of a person as insolvent certain applications made by the creditors of the insolvent were ordered to be 'filed'. The order previous to this order made it clear that further steps were expected to be taken by the creditors. An application made by the sons of the insolvent for substitution of their names in place of the insolvent who had died during the proceedings was dismissed. It was held that proceedings were not terminated and an execution application against the insolvent was incompetent (4).

Proceedings commenced before the order of adjudication are unaffected.—The sub-section bars the commencement of legal proceedings after the order of adjudication. It does not affect proceedings which were commenced before or are pending at the time of the order of adjudication (5). For such cases provision is made in O. 22, r 10, C. P. C. and section 29 of the present Act. Under both the provisions the matter is left to the discretion of the court in which the proceedings are pending. The Official Assignee is usually made a party to the proceedings. We have already considered this matter. All that is necessary to note is that the sub-section does not apply to such cases and there is no absolute bar to their continuance. An application under O. 34, r 6, C. P. C., for the passing of a personal decree against the mortgagor is not a new proceeding but a continuation of the original suit so that it does not come under the bar of section 16, P. I. A., 1907, as a new proceeding (6). For the purposes of the sub-section execution proceedings are not however necessarily a continuation of the suit proceedings. Thus the grant of permission to institute a suit does not necessarily cover permission to execute a decree obtained in that suit (7). A person against whom a decree had been made *ex-parte* applied to have the decree set aside; pending the application the decree-holder was declared an insolvent but this fact was not brought to

(1) Allapitchay v. S. S. A. S. Chetty, 64 I. C. 54 : A. I. R. 1920 L. B. 130.

(2) Ishar Das v. Mt. Fatima Bibi, A. I. R. 1934 Lah. 468 : 15 Lah. 698 : 153 I. C. 993 ; Ram Jodhia v. Hazarilall Mathura Prasad, 158 I. C. 18 : A. I. R. 1935 Pat. 480.

(3) Jevanji Mamooji v. Ghulam Hussain, 12 S. L. R. 20 : 47 Ind. Cas. 771.

(4) Ramajodhia v. Hazari Lal Mathura Prasad, A. I. R. 1935 Pat 480.

(5) Jethalal Kalianji v. Gangaram Naoomal, 68 L. R. 325 : 29 I. C. 50 : A. I. R. 1914 S. 114.

(6) Kishen Chand v. Sohan Lal, 59 I. C. 710 : 2 Lah. 95 : 3 L. L. J. 126 : 61 P. L. R. 1921 : A. I. R. 1921 Lah. 270.

(7) Bijai Inder Singh v. Charan Singh, 98 I. C. 525 : 49 All. 482 : A. I. R. 1926 All. 640.

- S. 28 the notice of the court, and the *ex-parte* decree was set aside. It was
 (2). held that the order setting aside the *ex-parte* decree was not an illegal order, as the Provincial Insolvency Act contained no prohibition to a creditor against going on with a suit or proceeding already pending at the date of the adjudication (1).

Remedy.—It has been held by the Allahabad High Court that a decree under O. 34, r. 36, C. P. C., is a remedy within the meaning of S. 16, P. I. A., 1907, and that the only remedy of the mortgagee is to prove his debt consisting of the balance left after the sale of the mortgaged property in the insolvency proceedings of the mortgagor. This case was dissented from in *Kishan Chand v. Sohan Lal* (2). There it was remarked: "A decree is not a remedy for a civil wrong but merely a step towards the remedy. The remedy is the general benefit accruing to the creditor through the execution of his decree, *i.e.*, the compensation secured to him by an execution. That remedy he can secure only through the insolvency court by proving his debt." Mr. Mulla supports the Lahore ruling on the ground that it is a continuation of the suit proceedings. It is submitted that so far as the case decides that the passing of personal decree against the insolvent is not a remedy, it is of doubtful authority. If the above observations are followed to their logical conclusion it would mean that a suit is not barred under the section till the stage of the decree but that it is only when it is sought to be executed,—a proposition to which it is very difficult to subscribe.

Other legal proceeding.—Commencement of any suit or other legal proceeding is barred under the section without the leave of the court. The question which has arisen for determination in decided cases is as to whether the words "against the property of the insolvent" should be read as a part of the expression "other legal proceeding" as well or not. The section bars in plain words the remedies of the creditors against the property of the insolvent. Does this section bar the creditor's remedies against the person of the debtor after the order of adjudication? In other words, is an application for execution by the arrest of the judgment-debtor after the order of adjudication included in the expression "other legal proceeding"? On this point there is a conflict of authorities amongst the different High Courts. The matter under consideration has been the subject of different legislations in the past. By section 341, Code of Civil Procedure, 1882, it was provided that "the judgment-debtor should be discharged from jail if he be declared insolvent as hereinafter provided." Section 16 of the Provincial Insolvency Act, 1907, ran as follows "On the making of an order of adjudication the insolvent, if in prison for debt, shall be released; and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act, shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit of legal proceeding except with the leave of the court and on such terms as the court may impose."

Now in section 28 the words "on the making of an order of adjudication the insolvent, if in prison for debt, shall be released," have been omitted and the words "or person" have also been omitted. From

(1) *Mussamat Asghari Begam v. Muhammad Yusuf*, 61 I. C. 534 (Lah.).

(2) 59 I. C. 710 : 2 Lah. 95 : A. I. R. 1921 Lah. 270.

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these omissions the intention of the legislature is fairly clear. For details of history see commentary under section 23 and also section 31. It has been held by the Allahabad (1) the Bombay (2) and recently by the Rangoon High Court (3) that section 23 of the present Act does not protect the insolvent from arrest and that he can be arrested in execution of a decree against him in the absence of a protection order. The contrary view has been taken by the Lahore (4), Patna (5), Rangoon (6), Oudh (7) and Madras (8) High Courts. For reasons in support of the first view reference may be made to the judgment of Bennet, J. in *Ali Husain v. Lachmi Narain Mahajan* (9), where the matter is fully discussed. For reasons in support of the second view see A. I. R. 1935 Mad. 239 (10) where the Allahabad ruling was cited and dissented from. The question is not free from doubt and it is desirable that the conflict may be set at rest by the intervention of the legislature.

Is a suit under Order. 21, Rule 63, C. P. C., by an attaching creditor a legal proceeding?—It has been held by the Madras High Court that the section prohibits without leave of the court a creditor from commencing any suit or other legal proceedings which would by its nature hamper or affect prejudicially the administration of the insolvent's estate in the insolvency proceedings; and that, unless the suit or other legal proceedings thus interfere with the insolvency proceedings, there is no reason why the insolvency court should have control over its institution. Relying on this reasoning it was held that where after the adjudication of the judgment-debtor as insolvent, a suit by a decree-holder under O. 21, r. 63, C. P. C., against a successful objector, who is alleged to have purchased the property from a judgment-debtor prior to attachment

(1) *Maharaj Hariram v. Sirikrishan*, A. I. R. 1927 All. 418 : 49 All. 201 : 100 I. C. 320; *Ali Husain v. Lachmi Narain Mahajan*, 54 All. 416 : 140 I. C. 150 : A. I. R. 1932 All. 183.

(2) *Mahomed Roshan v. Ghulam Mohiuddin*, 118 I. C. 791 : A. I. R. 1929 Bom. 135 : 31 B. L. R. 203.

(3) *Hamid v. Mohamed Shariff*, 13 Rang. 623 : 159 I. C. 934 : A. I. R. 1935 Rang. 415, dissenting from the earlier view held in *Tan Seik Ke v. C. A. M. C. T. Firm*, (1928) 6 Rang. 27 : 109 I. C. 769 : A. I. R. 1923 Rang. 109.

(4) *Firm Partap Singh Pardhan Singh v. Firm Bhai Mewasingh Jodhasingh*, 107 I. C. 608 : A. I. R. 1928 Lah. 258. See *Haveli Ram v. Zamindara Bank*, A. I. R. 1929 Lah. 453 : 117 I. C. 373, in which this case was distinguished on facts.

(5) *Hitnarayan Singh v. Brij Nandan Singh*, 10 Pat. 422 : 134 I. C. 633 : A. I. R. 1931 Pat. 357.

(6) *Thakurdeen v. Dubay*, 55 I. C. 250 : A. I. R. 1929 L. B. 45 : *Vishwanathan v. Abdul Majid*, (1925) 3 Rang. 187 : 80 I. C. 381 : A. I. R. 1925 Rang. 305 (Pt. I. A.) ; *Maung Po Toke v. Maung Po (Myi)*, (1925) 3 Rang. 492 : 92 I. C. 142 : A. I. R. 1926 Rang. 2 (Pt. I. A.), dissented from on another point in *Tan Seik Ke v. C. A. M. C. T. Firm*, (1928) 6 Rang. 27 : 109 I. C. 769 : A. I. R. 1928 Rang. 109.

(7) *Radhey Shyam v. Hakim Saiyed Mohammed Taqi*, A. I. R. 1923 Oudh 36 : 72 I. C. 911 ; *Shanker Lal v. Percha Ram*, A. I. R. 1936 Oudh 177 : 160 I. C. 33.

(8) *Eswara Iyer v. Govindarajulu*, A. I. R. 1926 Mad. 734 (2) : 31 I. C. 192 : 39 Mad. 689 ; *Alamelu Ammal v. Venkatarama Ayyar*, A. I. R. 1927 Mad. 919 : 105 I. C. 165 : 50 Mad. 977 (so assumed) ; *Swami Kotayya v. Venkata Rangarao*, A. I. R. 1935 Mad. 239 : 156 I. C. 428.

(9) *Ali Hussain v. Lachmi Narain supra*.

(10) *Swami Kotayya v. Venkata Rangarao supra*.

- S. 28** effected before insolvency does not fall within the prohibition (1). The
(2). contrary has, however, been held by the Nagpore (2) and the Rangoon High Courts (3). In the Rangoon case last cited Otter, J. remarked that the Code of Civil Procedure cannot of itself establish a right which does not exist under the ordinary law and that when such a suit is barred under the Provincial Insolvency Act the Civil Procedure Code cannot be invoked in help; but Baguley, J. was of different opinion, though he agreed with the interpretation put upon the sub-section. He said: "It seems to me that although the Civil Procedure Code is a code of procedure it does in this instance give a definite right to bring a suit within a period of limitation of its own as shown by Article 11, Sch. 1, Limitation Act; but, the Provincial Insolvency Act being of later date than the Civil Procedure Code, it must in this respect be regarded as limiting, so far as creditors of insolvents are concerned, a statutory right that they may have obtained under O. 21, r. 63, C. P. C.

The Allahabad High Court has also taken the same view as the Madras High Court has done. There R obtained a declaratory decree that certain property was not attachable or saleable in execution of a decree by H against his father S who was adjudged insolvent a few days before the declaratory decree. H appealed to the High Court against this decree and a preliminary objection was taken that the appeal was not maintainable as H had not obtained permission to bring the appeal as required by section 28 (2); it was held that the words "commence any suit or other legal proceedings" in clause 2 section 28. must be governed by the words "have any remedy against the property of the insolvent" in respect of the words occurring in that clause and, as the only effect of the appeal being allowed would be a declaratory decree that the property was attachable under the decree of defendant No. 1, that would not be a remedy against the property of the insolvent within the meaning of section 28. The Madras or the Rangoon rulings were not cited before the learned judges (4).

After an order of adjudication has been passed under S. 16, P. I. A., 1907, a creditor of the insolvent is debarred by sub-section (2) (b) of that section from suing under S. 53, T. P. Act, to set aside a transfer by the insolvent without first obtaining the leave of the insolvency court (5). The Madras case was disapproved in a subsequent decision of the same High Court (6), and it was there held that the principle of the decision was stated too broadly. An application under section 4, P. I. A., 1920, in

(1) *Donepudi Subramanyam v. Nune Narasimham*, 119 I. C. 46; A. I. R. 1929 Mad. 323, overruling and differing from *Vasudeva Kamath v. Lakshmi Narayan Rao*, 1919, 42 Mad. 684; 52 I. C. 442; A. I. R. 1919 Mad. 167 and also overruling *Narasimham v. Subarmaniam*, A. I. R. 1927 Mad. 201; 98 I. C. 446 on this point.

(2) *Trimbak v. Sheoram*, A. I. R. 1922 Nag. 108; 65 I. C. 941; 19 N. L. R. 126.

(3) *Raman Chetty v. Ma Hme*, A. I. R. 1917 L. B. 60 (1); 37 I. C. 803; *Mahomed Adjum Nacoda v. E. M. Chettyar Firm*, A. I. R. 1930 Rang. 317; 9 Rang. 7; 128 I. C. 382.

(4) *Harnam Chander v. Rupchand*, 54 All. 532; 141 I. C. 146 (1); A. I. R. 1932 All. 382.

(5) *Vasudeva Kamath v. Lakshminarayana Rao*, A. I. R. 1919 Madras 167; 52 I. C. 442; *Mt Majidan v. Chattru Mal*, 100 I. C. 383 (Lah.).

(6) *Donepudi Subramanyam v. Narasimham*, A. I. R. 1929 Mad. 323; 119 I. C. 46.

which it was prayed to court that the receiver should be directed to sell the insolvent's property for the benefit of the creditors, has been held to fall within the provision of section 23, sub-section (2) as to require the leave of the court to institute the proceedings thereupon (1). S. 28
(2).

Leave of the Court—A suit against a property of the insolvent can be only commenced with the leave of the court and on such terms as the court may impose. The bar contained in the section is not an absolute prohibition against the filing of suits in respect of debts provable in insolvency. It merely requires the would-be plaintiff to obtain permission from the insolvency court to sue the debtor (2). Where in an appeal against an adjudicating order it was contended that the result of the order was to prevent appellants from realizing their debt out of certain immoveable property fraudulently transferred to a relation a few days after his failure, and that the order should be set aside, it was held that the contention could not prevail. There is nothing in section 36, Provincial Insolvency Act, which prevents an official receiver from seeking to recover any immoveable property, which, there is reason to suppose, has been collusively transferred for the sole purpose of protecting it on behalf of the insolvent against his creditors. Under S. 16 (2) (b), P. I. A., 1907, it is still open to the creditors to apply to the court exercising jurisdiction in the matter for leave to commence a suit against the insolvent (3).

An insolvency court has jurisdiction, and would exercise a wide discretion, in permitting an executing creditor at his own risk and his own cost to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some benamidar or other person on behalf of the insolvent (4). Where, however, leave is granted to institute a suit, it does not necessarily cover permission to execute a decree obtained in that suit (5).

There is no rule of law requiring notice to be given to an insolvent before leave to file a suit is granted, and whether it is desirable to issue a notice to the insolvent or not must be decided on the facts of each particular case (6).

Leave may be expressed or it may be implied. Where an application by the debtor for his adjudication is opposed by the creditors on the ground that a transfer made by the debtor was fraudulent and collusive but the court passes an order of adjudication seeing that the transfer is more than two years old but specifically states that the creditors may

(1) *Vasudeva Sastri v. Yarlagadda Annapurnaamma Garu*, A. I. R. 1935 Mad. 809.

(2) *Greenburgh v. Xavier*, 64 I. C. 50 : 13 Bur. L. T. 197 : A. I. R. 1920 L. B. 148 ; *Sidhraj Bhojaraj v. Alli Haji*, 24 Bom. L. R. 509 : A. I. R. 1923 Bom. 33 : 67 I. C. 757 : 47 Bom. 244, (case under section 15, Indian Limitation Act.)

(3) *Ismailji Moosaji v. Manghanmal Watoomal*, 5 S. L. R. 80 : 12 Ind. Cas. 622.

(4) *Kallas Chandra Sarkar v. Kantiram Das Bania*, 37 I. C. 993 : A. I. R. 1918 Cal. 203.

(5) *Inder Singh v. Charan Singh*, 98 I. C. 525 : 48 All. 482 : A. I. R. 1926 All. 640.

(6) *A. K. R. M. M. C. T. Chettyar Firm v. S. E. Munnee*, 117 I. C. 570 : 6 Rang. 533 : A. I. R. 1928 Rang. 326.

- S. 28** file a separate suit challenging the transfer, no fresh leave to sue is necessary (1).
(2).

Where an application in insolvency, made by a creditor under section 4 asking for a declaration that a certain transaction was benami, was entertained by the court and it heard it and proceeded to give a decision upon it, the leave of the court under section 28 sanctioning the presentation of that application must be deemed to have been given (2).

A petition was made by the creditor to the receiver praying to set aside a certain benami transaction on the part of the insolvent and to put the property to sale for the benefit of creditors and the receiver declined to proceed in the matter. Whereupon an application to the court was made under section 4 of the Act and its attention was drawn to the fact of the receiver's refusal to proceed in the matter and that he was joined as a party to the present application. It was held that there was sufficient compliance with the provisions of section 28, sub-section (2) as the sanction of the court was asked for by necessary implication (3).

Consequences where leave is not obtained—The section does not lay down as to what is to be done with a suit or legal proceeding commenced after the order of adjudication without the leave of the court. It has been held that the leave contemplated under the section is leave which ought to be obtained before commencement of the suit and cannot be granted after the same has been filed (4). Even if it is granted by the insolvency court after the commencement of the suit or proceeding, it cannot be utilised to cure the defect in the suit (5). It does not cease to be non-maintainable even where the insolvency proceedings after institution of the suit came to an end (6).

In the case last cited, Wallace, J., after having referred to the authorities, made the following observations :—

“No doubt, as was recognised, this may work hardship in certain cases, for example, where the plaintiff is ignorant of the insolvency

(1) *Chattru Mal v. Mt. Majidan*, A. I. R. 1934 Lah. 460 : 15 Lah. 849 : 150 I. C. 883.

(2) *Padilam Narayanamma v. Neti Venkatasomayajulu*, A. I. R. 1935 Mad. 46 : 153 I. C. 624 ; *Vasudeva Sastri v. Annappurnamma* (Garu, 161 I. C. 732 : A. I. R. 1935 Mad. 809).

(3) *Vasudeva Sastri v. Annappurnamma* (Garu, A. I. R. 1935 Mad. 809 : 161 I. C. 732).

(4) *Dwarkadas v. Tejbandas*, 40 Bom. 235 : 31 I. C. 948 : A. I. R. 1915 Bom. 134 ; *Maya Ookeda v. Kaverji Kurpal*, 138 I. C. 788 : A. I. R. 1932 Bom. 378 ; (*Dagood*) *Mohideen Rowther v. Sabib Deen Sahib*, A. I. R. 1937 Mad. 667, (case-law discussed).

(5) *C. Ghouse Khan v. Balasubba Rowther*, 105 I. C. 109 : A. I. R. 1927 Mad. 925 ; *Jivanji Mamooji v. Ghulam Hussain*, 47 I. C. 771 : A. I. R. 1918 Sind 38, (the judge resiling from his own judgment in *Gopaladas v. Pablumal*, 30 I. C. 37 : A. I. R. 1915 Sind 34) ; *Dadulal v. Namdev*, 145 I. C. 697 (2) : A. I. R. 1933 Nag. 217. (The case of *Haji Umar Sharif v. Jwala Prasad*, A. I. R. 1924 Nag. 300 : 79 I. C. 662 was not cited. This last case is noticed *infra*) ; *Pannalal Tassaduq Hussain v. Hiranand Jiwanram*. A. I. R. 1928 Lah. 28 : 8 Lah. 593 : 102 I. C. 37 ; See also *Rowe and Co. v. Tan Thein Taik*, A. I. R. 1925 Rang. 105 : 2 Rang. 643 : 84 I. C. 909.

(6) *Ponnusami Chettiar v. Kaliaperumal Naicker*, 113 I. C. 550 : A. I. R. 1929 Mad. 480 ; *Surju Prasad Bhagwati Prasad v. Rajendraprasad*, A. I. R. 1937 All. 271 (P-t. I. A., 1909).

proceedings altogether. But after all, the Gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and to the insolvency court. All the creditors could file suits without leave and maintain that the court should keep them pending until the insolvency proceedings had come to an end on the ground that the initial bar would then be removed. That would be practically overriding section 28. The insolvent is entitled to the protection of the court against the commencement of any such suit" (1). Accordingly it has been held that a suit brought without such leave is liable to be dismissed (2) and a decree obtained against the insolvent in a suit brought without the leave of the court is a nullity (3). The execution proceedings of such a decree and the sale of the insolvent's property in such execution proceedings are also void and do not bind the official receiver (4).

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(2).

A less strict view has however been taken in other cases. Thus it has been held that the prohibition contained in the section applies only to creditors having notice of the proceedings and does not affect persons having claims against the insolvent to whom no notice whatsoever of the insolvent's application has been delivered (5). Again want of leave is a defence which can be taken in the suit, but it can be waived or there may be circumstances in which such waiver may be inferred (6). The matter was discussed in detail in A. I. R. 1929 Mad. 323 (7), and Wallace, J., laid down the law in the following words:—"The prohibition in section 16 is directed not to the court but to the party, and therefore when a party is wholly ignorant of the adjudication he should not be penalized for not bringing to court's notice a matter of which he was wholly ignorant, but what is required is that a defence by way of plea of want of leave shall not be denied to the debtor in the suit if he does raise the defence of want of leave, then the court shall dismiss the suit or permit it to proceed upon terms; but if he does not raise the defence, the proper order would be to rule that the objection has been waived and cannot be later pressed. The prohibition is merely a restraint on the exercise of jurisdiction, and is a matter of procedure and there is no inherent want of jurisdiction."

(1) See *Gangadin Gur Parshad v. Jagmohan Singh*, A. I. R. 1936 Oudh 236; 160 I. C. 229.

(2) *Sri Nivasayya v. Nagappa*, A. I. R. 1936 Mad. 984; 166 I. C. 959.

(3) *Mokshagunam Subramania Aiyar v. Rama Krishna Aiyar*, 70 I. C. 357; A. I. R. 1922 Mad. 835; L. W. Nasse, in the matter of, 118 I. C. 615; 7 Rang. 201; A. I. R. 1929 Rang. 229; See also *Venkatamavva v. Viravya*, 160 I. C. 423 (2); A. I. R. 1936 Mad. 57, where a less strict view was taken.

(4) *Mokshagunam Subramania Aiyar v. Rama Krishna Aiyar supra*; *Ponnuthaw Ammal v. Official Receiver, Coimbatore*, 146 I. C. 417; A. I. R. 1933 Mad. 858.

(5) *Fida Hussain v. The Collector of Shahjahanpur*, 17 O. C. 267; 25 I. C. 708; A. I. R. 1914 Oudh 322; *Haji Umar Shariff v. Jwala Prasad*, A. I. R. 1924 Nag. 300; 79 I. C. 662; *Des Raj Raghunath v. Duni Chand*, 60 I. C. 588 (Lab.); A. I. R. 1920 Lah. 42.

(6) *Narasimham v. Subramaniam*, 98 I. C. 446; A. I. R. 1927 Mad. 201; *Satyamma v. Official Receiver, Krishna District*, 146 I. C. 699; A. I. R. 1933 Mad. 917; *Malan Devi v. The Amritsar National Bank, Ltd.*, 162 I. C. 39; A. I. R. 1936 Lah. 286.

(7) *Donepudi Subramanyam v. Narasimham*, A. I. R. 1929 Mad. 323; 119 I. C. 46.

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Where a suit is filed after the order of adjudication but without the leave of the insolvency court, there is a conflict of opinion as to whether such a suit can be stayed under section 29 of the Act. As already noted it was held by the Bombay High Court *in re* Dwarkadas-Tejbbhandas (1), that leave contemplated by S. 17, P.-t. I. A. must be obtained before the commencement of the suit or proceeding and that it cannot be given afterwards. There was no question about the applicability of section 29 in that case but it has been followed for holding the view that section 29 applies only to cases pending on the date of the order of adjudication (2). In another Bombay case (3) it was held that the wording of sub-section 3, S. 18, P.-t. I. A. is wide enough to justify a stay of proceedings in an action which was not pending on the date of the order of adjudication. This case was followed, though with some hesitation, by Fawcett, J., in a subsequent Bombay case (4). The same view has been taken by the Bombay High Court in a case arising under the Provincial Insolvency Act, where there is a very learned and able exposition of the subject by Tyabji, J. (5). The corresponding provision of the Bankruptcy Act is section 9, B. A., 1914, which provides for the stay of suits. The leading English authority is *Brownscombe v. Fair* (6). The facts in that case were as follows : The plaintiff had commenced the action without leave of the court. The plaintiff had thereafter obtained from the Master and sitting Judge in Chambers leave to proceed with the action. The insolvent appealed to the Divisional Court. He contended that leave ought not to have been given. The Divisional Court discharged the order giving leave. It held that there was no special ground why the action should be allowed to proceed and ordered that it should be stayed. It was not argued on behalf of the insolvent either before the Master or the sitting Judge in Chambers or before the Divisional Court that inasmuch as leave had not been obtained at the time of commencing the action, it was initially defective, that the defect could not be cured at the latest stages and that the only course then open to the court was to dismiss the action. The order was either under section 7, Bankruptcy Act, 1883, which corresponds to S. 17, P.-t. I. A., and S. 28 (2), P. I. A., or S. 10 which corresponds to S. 18 (3) P.-t. I. A. and S. 29, P. I. A. Referring to section 10, Wills, J., said ;

"The intention of the legislature in the Bankruptcy Act was that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances such as where a case was at the time of the bankruptcy ripe for trial in which the amount of the proof against the bankrupt's estate would not be seriously affected. But there must be some such circumstances ; in the present case there is nothing exceptional. Mr. Rose-Innes says that the jurisdiction of the court is limited to actions commenced before bankruptcy proceedings are initiated ; but I do not think so, for the words are per-

(1) (1915) 40 Bom. 235 : 31 I. C. 948 : A. I. R. 1915 Bom. 134.

(2) *Maya Ookeda v. Kuverji*, 138 I. C. 788 : A. I. R. 1932 B. 338.

(3) *Mohamed Haji Essack v. Abdul Rahiman*, 40 Bom. 461 : 31 I. C. 507 : A. I. R. 1915 Bom. 273.

(4) *Bheraji Samrathji v. Vasant Rao-Govind Rao*, A. I. R. 1929 Bom. 398 : 120 I. C. 840.

(5) *Bhimaji Bhibut Mal v. Chuni Lal Javarchand*, A. I. R. 1932 Bom. 344 : 57 Bom. 623 : 138 I. C. 824.

(6) 1887, 58 L. T. 85.

fectly general." Similarly in *Blount v. Whitely*, (1899) 6 Mans. 48 : 79 L. T. 635, an action brought without leave was stayed. There was no question of leave having been obtained, inasmuch as the plaintiff contended that leave was not necessary. The debtor applied that the action should be merely stayed under section 9, Bankruptcy Act, 1883. Grantham, J. refused that application but the Court of Appeal stayed the action in accordance with the provisions of section 9, Bankruptcy Act. The effect of these two cases is thus stated in Halsbury's Laws of England, Volume 2 (edition I, page 63 and page 90).

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"Similar actions which are commenced after the receiving order without leave of the court may/will be stayed. The English case of *In re Wanzer, Limited*. (1) also appears to be an authority for the proposition." It is therefore clear that in England an action brought without leave of the court will not be dismissed but will be stayed either under the corresponding provision of section 28, P. I. A. or that of section 29.

The contrary view has, however, been taken by the Madras (2) and Lahore (3) High Courts. It may also be safely anticipated that High Courts which have ruled leave under section 28, sub-section (2) to be a condition precedent to the institution of the suit will adopt the view of the Madras and Lahore High Courts because in holding that the suit must be dismissed in the absence of leave they have impliedly also decided that section 29 cannot be invoked to prevent such dismissal.

Limitation.—After an adjudication is annulled, the only remedy open to a creditor to enforce his claim is by way of suit. It may thus happen that a suit, which was not barred on the date of the order of adjudication might become barred by the time when the adjudication is annulled. In cases of this kind the question arose whether the period from the date of the order of adjudication to the date of the order of annulment should be excluded in computing the period of limitation for the suit. Under the Provincial Insolvency Act, 1907, it was held that it could not be so excluded, even if the creditor's proof was admitted by the official assignee or receiver, unless there was an acknowledgment in the meantime such as would bring the case within section 19 of the Indian Limitation Act, 1908 (4). It was also held that this period could not be excluded under S. 15, I. L. A., because under the sub-section an absolute stay of all proceedings was not effected. Under the present Act special provision has been made under section 78. For full notes see commentary under section 78.

An application under section 78 (2) to the insolvency court for leave to execute a decree is not an application made to the proper court within the meaning of the explanation to Art. 182, I. L. A., and does not save limitation. The insolvency court which is entirely a creature of the Provincial Insolvency Act is a different court from the court which is to execute a decree obtained independently of the Insolvency Act and the mere fact that the judgment-debtor is the same person will not make the two courts the same (5).

(1) (1891) 1 Ch. 305 : 39 W. R. 343 : 60 L. J. Ch. 492.

(2) *Ponnusami Chettiar v. Kaliaperumal Naicker*, 113 I. C. 550 : A. I. R. 1929 Mad. 480.

(3) *Panna Lal v. Hiranand*, 8 Lah. 593 : 102 I. C. 37 : A. I. R. 1928 Lah. 28.

(4) *Ramaswami v. Govindaswami*, (1918) 42 Mad. 319 : 49 I. C. 625.

(5) *Chathangali Rurichan v. Puvvamparambati*, A. I. R. 1934 Mad. 392 ; 7 Mad. 808 : 150 I. C. 113.

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Sub-section 3 : reputed ownership, its meaning and object.—

In this sub-section we have what is generally called the reputed ownership clause or the order and disposition clause. The insolvent is only the reputed and not the real owner of the goods. Its object is the protection of the general creditors of a trader against that false credit which might be acquired by his being suffered to have the possession and power of disposition of property as his own, which does not really belong to him. Any one who enables a trader to gain false credit by holding out his goods as the trader's own to the outside world has to suffer the penalty of losing those goods (3). Property which does not belong to the insolvent is thereby made available for distribution amongst his creditors by the Official Assignee. It is to take one man's property to pay another man's debts. This is one of those cases in which the Official Assignee, as representing the interests of the general body of creditors, has a higher title than that the insolvent himself would have had. The burden of proving circumstances of reputed ownership lies on the Receiver or Official Assignee (4).

The clause is in its nature a penal one and it is an exceedingly harsh, if not an unscrupulous, provision (5). The clause has therefore been construed strictly and in course of time the provision has been hedged round with many conditions.

History of reputed ownership clause.—Reputed ownership has been the part of the bankruptcy law of England since 21 Jac. 1, c. 19, S. 11. Since then it has been couched in various terms in the successive bankruptcy statutes (6), but the same principle has run through all. The earliest exposition of the doctrine of reputed ownership was laid by *Lord Redesdale in Joy v. Campbell* (7) and has been approved and acted on in subsequent cases. The present section 38 of Bankruptcy Act, 1914, is re-enacted from the Act of 1883, which corresponded with sub-section 5 of the Act of 1869 save in the following respects:—

1914	1869
In his trade or business. Under such circumstances that he is the reputed owner thereof.	being a trader. of which goods the bankrupt is re- puted owner or of which he has taken upon himself the sale or disposition as owner.
Due or growing due.	due.
Goods.	Goods and chattels.

(3) *Kadibhoy Ismailji*, 11 I. C. 14: 5 S. L. R. 78; *(thulam Ali T. Mandviwalla v. Official Assignee*, A. I. R. 1937 Sind 37.

(4) *Firm of Gianchand Lilaram*, In the matter of, 131 I. C. 705: A. I. R. 1931 Sind 70.

(5) *Re Hickey*, 10 L. R. Eq. 129, cited in *Colonial Bank v. Whinney*, 1886, 11 A. C. 426, 444.

(6) See 5 Geo. 4, c. 16, S. 72; B. A., 1849, S. 125; B. A. 1869, S. 15; B. A., 1883, S. 44; B. A., 1914, S. 38; Mulla, page 375.

(7) (1804) 1 Sch. and Lef, 328, 336,

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Analogous law.—The sub section corresponds to section 52 (2) (c), Pt. I. A. and section 38 (2) (c), B. A., 1914, except for the proviso that things in action other than the debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods for the purposes of the reputed ownership clause. The proviso occurs in both the Presidency-towns Insolvency Act and Bankruptcy Act, 1914. The Presidency-towns Insolvency Act also contains an additional proviso giving a true owner a right of proof in insolvency for the value of such goods as come within the reputed ownership of the insolvent. This proviso too is omitted from the present sub-section of the Provincial Insolvency Act, but the same principle will hold good under the latter Act. The sub-section enacts clause 3 of section 16, P. I. A., 1907.

Apart from the differences in the provisions expressly dealing with reputed ownership, one more difference has arisen between the law under the Provincial Insolvency Act and that under the Presidency-towns Insolvency Act or British Bankruptcy Act. It is this that under the Provincial Insolvency Act the reputed ownership clause does not apply to the case of a secured creditor (1). We shall revert to it later on. Again it may be noted that under the latter Acts the point of time when the reputed ownership clause takes effect is the commencement of the insolvency whereas under the present Act it is the date of the presentation of the petition on which the order of adjudication is made.

Applicability.—In order that the sub-section may apply it is necessary that the following conditions should be satisfied :—

1. Goods should be, at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business ;
2. The possession of the goods should be under such circumstances as to make the insolvent the reputed owner thereof ; and
3. That the goods should have been in the possession of the insolvent in his trade or business under such circumstances that he is the reputed owner thereof by the consent and permission of the true owner. In other words, the consent and permission of the true owner should extend not only to the goods being or remaining in possession of the insolvent but also to the circumstances under which the insolvent is in possession and which make the insolvent the reputed owner of those goods.

Unless all the three conditions stated above are satisfied, the clause will not apply. We proceed to consider each one of the above conditions in the order in which they are stated above.

First condition.—The first condition is that the goods should be, at the date of the presentation of the petition on which the order of adjudication is made, in the possession, order or disposition of the insolvent in his trade or business. In order to satisfy this condition, four facts are necessary to prove. They are : firstly, that the property should be "goods"; secondly, they should be in possession, order or disposition of the insolvent ; thirdly, the possession, etc., over the goods by the insolvent should be in his trade or business and fourthly that all the first three facts should

(1) Wyse Re v. Chowksey *Ex parte*, 6 S. L. R. 97 : 17 I. C. 31 ; Shamal Das Kschetry v. Phanindra Nath, A. I. R. 1923 Cal. 532 : 72 I. C. 467 ; Moti Ram v. Rodwell, A. I. R. 1923 All. 159 : 76 I. C. 749,

S. 28 have co-existed at the date of the presentation of the petition on which
(3). the order is made.

Firstly—goods.—"Goods" include all chattels personal. It means that every sort of personal estate, except chattels real and heirlooms, are included within these words. They include choses in action (1), bills of exchange (2), stock in the public funds (3), judgment-debts (4), proceeds of goods sold (5), freight (6), promissory notes (7), policies (8), annuities (9), a contingent reversionary interest in stock (10), the right to print a newspaper (11), shares in companies with a few exceptions (12), a share in the assets of a partnership, even though the assets include an interest in real estate (13) and ships (14).

The clause does not apply to immoveable property which includes land or interests in land, houses, or things affixed to the freehold (15). The fact that as between landlord and tenant such fixtures would be removable by the tenant makes no difference (16). A heavy oil press, worked by a kerosine oil engine whose shafts and pulleys are bolted on to the posts of the house, though capable of removal by unscrewing the bolts, does not fall within the scope of the word 'goods' (17). On the other hand, articles slightly annexed by a shopkeeper to the premises of which he is the tenant for more efficient use thereof and not for the improvement of the freehold, retain their character of chattels and come within the clause (18). Growing crops, it would seem, are not goods within the meaning of this section (19). An equity of redemption in goods pledged by the insolvent is not goods within the meaning of the clause and the fact that the pledgee or charge-holder leaves the power to sell such goods with the insolvent does not render the pledge or charge invalid (20).

Secondly,—nature of the possession, order or disposition of the insolvent.—Possession of the goods need not be actual possession; con-

- (1) *Ryal v. Rolle*, 1 Ves. 348, 375.
- (2) *Horn Blower v. Proud*, 2 B. and A. 327.
- (3) *Exp. Richardson*, Buck, 480.
- (4) *Re Wethered*, 1926 Ch. 167.
- (5) *Gordon v. East Indian Company*, 7 T. R. 228; *Cooke v. Hemming*, L. R. 3 C. P. 334.
- (6) *Leslie v. Guthrie*, 1 Bing. N. C. 697.
- (7) *Belcher v. Campbell*, 8 Q. B. 1.
- (8) *Gale v. Lewis*, 9 Q. B. 730; *Green v. Ingham*, L. R. 2 C. P. 525.
- (9) *Exp. Smyth*, 3 M. D. and D. 687; *Waldron v. Sloper*, 1 Drew. 193.
- (10) *Bartlett v. Bartlett*, 1 DeG. and J. 127.
- (11) *Exp. Foss*, 2 DeG. and J. 230.
- (12) *Williams*, page 277.
- (13) *Re Bainbridge*, 8 Ch. D. 218.
- (14) *Stephens v. Sole*, 1736, cited 1 Ves. Sen. 352; *Hay v. Fairburn*, 2 B. and A. 193; *Monkhouse v. Hay*, 2 Brod. and B. 114 though a registered mortgage of a ship under S. 36 of 57 and 58 Vict. c. 60 is excluded from the clause.
- (15) *Horn v. Baker*, 9 East, 215 & 2 Sm. L. C., 11th ed, 232.
- (16) *Macleod v. Kikabhoy*, (1901) 25 Bom. 659.
- (17) *On Pe v. Kun Ti*, 6 L. B. R. 44 : 14 Ind. Cas. 447. (3 Bom. L. R. 426 Foll).
- (18) *Horwich v. Symon*, (1914) 110 L. T. 1016; *Macleod v. Kikabhoy*, (1901) 25 Bom. 659.
- (19) *Cooper v. Woolfitt*, (1857) 26 L. J. Ex. 310.
- (20) *Official Assignee Madras v. Velliappa Chetti*, 69 I. C. 968 : 45 M. 238; A. I. R. 1922 M. 144.

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structive possession is sufficient. Thus goods in the possession of a servant (1), of a warehouse-keeper or deposittee (2), of a carrier (3) or of a lessee or hirer (4) will be considered to be in his possession, because they cannot be delivered to any other order than that of the insolvent.

There appears to be a conflict of opinion under English law as to whether the possession of the pawnee is the possession of the bankrupt pawnor or not. It was held in two cases that the possession of a pawnee is not the possession of a bankrupt pawnor so as to bring the goods pawned within the statute as against the true owner, on the ground that the bankrupt could not have obtained possession of the goods from the pawnee without repaying to him the money that he had advanced (5). It was, however, held in *Exp. Roy* (6) that the possession of the deposittee was the possession of the depositor, even though the deposit was wrongful as against the true owner. These cases were cited and referred to in a Madras case (7) but the actual point was left open.

Chattels belonging to the wife and kept in the conjugal domicile of the husband and wife are not in the reputed ownership of the husband. Goods which have been taken out of the possession of the insolvent and placed in custody of law do not remain in the possession, order or disposition of the insolvent for the purposes of this clause. Thus a seizure under a distress of goods previously in the order or disposition of the bankrupt takes them out of the statute (8). Similarly goods which have been taken possession of by a receiver appointed by the court prior to insolvency do not come within the clause (9). There is a conflict of opinion as to goods attached and seized by the sheriff under an execution against the insolvent. In two cases it was held that such goods were not in the order and disposition of the insolvent and did not pass to the trustee (10). But in *Exp. Edey* (11) it was held, apparently on the authority of *Barrow v. Bell* (12), that if the possession of the sheriff is wrongful, seizure of goods by him cannot be taken to have disturbed the possession of the bankrupt. The first two cases were followed by the Calcutta High Court (13). In regard to the latter view, Wilson, J., remarked as follows:

"Those in favour of the other view are *Barrow v. Bell* (5 Ell. and Bl. 540) and *Ex parte Edey* (L. R. 19 Eq. 264). But the only grounds suggested in those cases for saying that an actual seizure by the sheriff does not put an end to the reputed ownership, is, that the sheriff is in

(1) *Exp. Bolland*, 24 L. T. 335; *Jackson v. Irwin*, 2 Camp. 48.

(2) *Knowles v. Horsfall*, 5 B. & A. 134.

(3) *Hervey v. Liddiard*, 1 Stark 123.

(4) *Hornsby v. Miller*, 28 L. J. Q. B. 99.

(5) *Greening v. Clark*, 4 B. & C. 316; *Webb v. Whinney*, 18 L. T.

523.

(6) 1875, 7 Ch. D. 70.

(7) *Official Assignee of Madras v. Velliappa Chetti*, A. I. R. 1922 Mad. 144: 45 Mad. 288: 69 I. C. 968.

(8) *Sacker v. Chidley*, 11 Jur. N. S. 654.

(9) *Taylor v. Eckersley*, (1877) 5 Ch. D. 740: 25 W. R. 527: 3 L. T. 442; *Nethun Gadi Bank v. Official Assignee of Madras*, A. I. R. 1929 Mad. 184: (1929) 52 Mad. 938: 118 I. C. 70.

(10) *Fletcher v. Manning*, 12 M. & W. 571; *Ex parte Foss*, (1868) 2 De. G. & J. 230: 44 E. R. 977.

(11) L. R. 19 Eq. 264.

(12) 5 E. R. 540.

(13) In the matter of *Brown*, 12 Cal. 629.

S. 28 such cases a mere wrong-doer, his only authority being to seize the
(3). seizable goods of the judgment-debtor, and goods under mortgage, in which his interest is only equitable, not being liable to seizure under a *fiery facias*. In this country there is no distinction between legal and equitable titles for the purpose of execution, and the officer executing process by seizure is not a mere wrong-doer in a case like the present. The considerations, therefore, upon which it has been thought in England that seizure by the sheriff does not take goods out of the order and disposition of the judgment-debtor, do not seem to apply in this country. Upon this point, however, it is not necessary to give any actual decision."

It would, therefore, seem that the latter view will not be followed in India. Even in England the question is not free from doubt and it appears that *Exp. Edey* goes too far (1).

Sole possession essential.—To bring goods within the order and disposition of the bankrupt, they must be in the sole possession and sole reputed ownership of the bankrupt. Thus where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt, it was held that goods which were in the joint possession of the two partners as reputed owners did not pass to the trustee (2). The same principle will apply to a case where the other partner is a dormant partner. Thus it has been held that the property of a brother and sister who carried on business together as partners, the brother being the ostensible trader and the sister a dormant partner, does not pass to the trustee under the doctrine of reputed ownership on the bankruptcy of the brother (3). In India the principle was applied to a case where one partner became bankrupt and the other partner was outside the jurisdiction of the court and could not be adjudged bankrupt (4). The principle of these decisions was thus explained by the Lord Justices in *Ex parte Dorman* (5).

"It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession of the firm of A and B, of whom A becomes bankrupt, but B remains solvent, the goods should become the property of A divisible among his creditors."

But where the private property of one partner had been used as if it were partnership property, it was held to pass to the assignees of the joint estate, as there was no possession by the partner whose private property it was, except as a member of the firm (6). This rule applies also to an ostensible partnership as where a firm belongs exclusively to one person, but he holds himself out as partner with another. Thus if a father who is the real owner of a business carries it on in the name of himself

(1) William's Bankruptcy Practice, 14th edition, page 282.

(2) *Exp. Dorman*, L. R. 8 Ch. 51 followed *In re Bainbridge*, 8 Ch. D. 218.

(3) *Reynolds v. Bowley*, L. R. 2 Q. B. 474; *Exp. Enderby*, 2 B. & C. 389.

(4) In the matter of *Morgan*, 6 Cal. 633 distinguishing an earlier case, *In re Hill*, *Exp. Lepage*.

(5) L. R. 8 Ch. D. 51.

(6) *Exp. Hayman*, 8 Ch. D. 11.

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and his son, and the son, who is not in fact a partner, manages the business, though belonging to the father, it will on the insolvency of the father and the son be treated, by virtue of the doctrine of reputed ownership, as the joint estate of the two and divisible among the creditors of the firm. The creditors of the father cannot claim it as his separate property. This rule does not apply unless there is an ostensible partnership held out to the world. It must be shown that the son was held out as a partner to the world. It will not do to show that some one creditor of the firm, or two or three creditors, might have received information that the son was liable as partner (1). A representation that there is a partnership is sufficient to create joint estate; it is created by reputed ownership (2). All that is necessary is that a person should hold himself out as a partner with another. The fact that there is a secret arrangement between them that the whole of the assets shall belong to one of them will not prevent such assets being the assets of the firm. Thus where C has entered into an agreement with R that R should buy and sell goods on behalf of C, that the business should be carried on as R and Co., R being paid by salary and a commission on the profits, and the business was managed by R, but C had bought goods for it, it was held that upon each of them becoming bankrupt the book debts and stock in trade of R and Company, was joint estate of the two by the doctrine of reputed ownership (3). Questions of reputed ownership often arise with relation to partners, sometimes as between individual partners and the firm; sometimes as between out-gone partners and the continuing members of the firm; sometimes between an old firm and a new firm, created by the introduction of new members into the old firm; but most frequently the question of reputed ownership arises in the administration of joint and separate estates. See section 61, sub-section (4) in this connection.

We have seen that the goods should be in the possession, order and disposition of the insolvent on the date of the presentation of the petition. It follows that if the true owner determines the possession of the insolvent before that day the goods cease to be in the possession of the insolvent and the title of the true owner will prevail against the Official Assignee. We now proceed to consider how the insolvent's possession might be determined as to take the goods out of the statute.

Determination of possession.—The mode in which possession may be taken differs according to the character of the goods and their situation. Where goods and chattel are of such a character or are so placed as to admit of actual delivery, transfer of actual possession to the true owner is necessary (4). Where the goods and chattel do not admit of such actual delivery, symbolical possession will suffice (5). In some cases the law merchant or the statute law makes a transfer of the documents of title sufficient to alter the possession of the goods thereby represented; thus endorsement and delivery of a bill of lading transfers the possession of the goods. But generally where goods are not in the custody of the

(1) *Ex parte Hayman*, (1878) 8 Ch. D. 11; *Re Rowland and Crankshaw*, (1866) L. R. 1 Ch. App. 421; *Ex parte Sheen*, (1877) 6 Ch. D. 235.

(2) *Exp. Arbouin*, 1846, De Gex, 359.

(3) *Re Rowland and Crankshaw*, L. R. 1 Ch. App. 421.

(4) *C. Storer v. Hunter*, (1824) 2 B. and C. 368, 384; 107 E. R. 770, 776.

(5) *Manton v. Moore*, 7 T. R. 67; *cf. Re Eslick*, 4 Ch. D. 496.

- S. 28** bankrupt, the indorsement and delivery of a delivery order, dock warrant
(3). or other document of title are not sufficient to determine the possession
 of the bankrupt, unless notice be given to the agent having custody on
 behalf of the bankrupt and he attorns to the true owner (1).

A bill of lading is a document of title both in England and in India (2). The leading Indian authority on the point as to when a particular document is a document of title to goods is *Ram Das v. Amerchand & Co.* (3). There it was laid down that whenever any doubt arises as to whether a particular document is a document showing title or a document of title to goods, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document by transfer to receive the goods thereby represented. In the same case as well as in other cases (4) it has been held that a railway receipt which entitles the endorsee to delivery is such an instrument. Thus it has been held that the pledgee of a railway receipt and in possession thereof is entitled to a charge for his debt on the goods themselves in the possession of the carrier and as soon as the pledge is made the insolvent's right to get delivery from the railway company ceases and the goods are no longer in the eye of law in the possession, order or disposition of the insolvent within the meaning of clause 3 of S. 16, P. I. A., 1907 (5).

Again, as regards taking possession it is settled law that it is not ineffectual to exclude the operation of the section because it is friendly provided it is real and not sham (6). Thus where the mortgagee with the intention of assuring his rights under the mortgage deed left a man in possession of household furniture mortgaged to him, such furniture being then within the order and disposition of the mortgagor, and the man remained in the back premises; and the mortgagor with the consent of the mortgagee continued to use the furniture as before subject to the control of the man in possession, it was held on the bankruptcy of the mortgagor that the possession taken, though friendly, was real, and that the title of the mortgagee prevailed over that of the trustee (7). In an Indian case (*Agabeg's case*) (8) where the mortgagee of furniture had put a darwan (watchman) at the gate, and sent a man to make a catalogue with a view

(1) William's Bankruptcy Practice, 14th edition, page 282; A contrary opinion appears to have been expressed in *Mercantile Bank of India v. Official Assignee of Madras*, 56 Mad. 177: 143 I. C. 641: A. I. R. 1933 Mad. 207.

(2) See Bills of Lading Act, 1856 (Act 9 of 1856).

(3) (1916) L. R. 43 I. A. 164: 40 Bom. 630: A. I. R. 1916 P. C. 7: 35 I. C. 954.

(4) *Doalat Ram v. The B. B. and C. I. Railway Company*, 1914, 38 Bom. 659: A. I. R. 1914 Bom. 178: 25 I. C. 380; *Fakeerappa v. Thippanna*, (1913) 38 Mad. 664; see as to the incidents of a railway receipt in general, *M. and S. M. Railway Company, Ltd., v. Hari Dass Bannmali Das*, (1918) 41 Mad. 871 at pages 881 to 883: 49 I. C. 69: A. I. R. 1919 Mad. 140.

(5) *Fakeerappa v. Thippanna*, A. I. R. 1916 Mad. 750; *Mercantile Bank of India v. Official Assignee of Madras*, 56 Mad. 177: 143 I. C. 641: A. I. R. 1933 Mad. 207.

(6) *Ex parte National Guardian Assurance Co.*, (1878) 10 Ch. D. 408; *Vicario v. Hoolingsworth*, (1869) 20 L. T. 362.

(7) *Ex parte National Guardian Assurance Co.*, *supra*.

(8) 2 Ind. Jur. 340, cited in Mulla's Law of Insolvency at page 405.

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to the disposal of his furniture by public auction, but the mortgagor was in the meantime allowed to use the furniture as before until his insolvency, the High Court of Bengal held that the furniture was in the order and disposition of the insolvent, and that it passed to the official assignee. In Mr. Mulla's opinion, this decision is erroneous and is inconsistent with the English case, *Ex parte National Guardian Assurance Company* (1).

The taking of possession is not effectual unless the true owner has the right to take possession of the goods. If the mortgagee is entitled to possession on the breach of a condition by the mortgagor or on the happening of a specified event, his taking possession will be effectual provided the breach of the condition or the specified event has happened before he takes possession. Where goods are mortgaged, but the keys of the godown containing the goods are under the agreement to remain with the mortgagor during business hours, the mortgagee having the custody of the keys only at night, the goods are in the order and disposition of the mortgagor, and they will pass to the official assignee on his insolvency (2). Where a trader obtained an advance under an agreement that he should deliver to the lender the next day goods of an equivalent value lying in his godown to secure the loan, and they both put their own locks on the door of the godown, and the borrower absconded the same night, it was held that the goods were not in the possession, order or disposition of the borrower and that the lender and not the official assignee was entitled to the goods (3). Goods covered by a railway receipt pledged by the owner to secure an advance against them are not within the possession, order or disposition of the pledger, and the pledgee, and not the official assignee, is entitled to obtain possession of the goods from the railway company on the insolvency of the pledger (4).

It is a question of fact to be determined according to the circumstances of each case as to when the taking of possession of part of the goods is tantamount to taking possession of the whole. In any case such an act is an evidence of the withdrawal of the true owner's consent as to the whole and not only to the part of the goods of which actual possession has been taken.

As to when possession is taken after the date of the petition of insolvency and before the order of adjudication, see *infra*.

"In his trade or business."—In the corresponding section of the English Act of 1869 the words were "being a trader." The expression occurred for the first time in the Act of 1883. These words did not occur in the Indian Insolvency Act, 1848, as well. The result was that before the insertion of the present expression in the section, all goods, whether they were in possession of the insolvent in his trade or not, passed to the official assignee under the reputed ownership clause. Under the present Act it is not so. The phrase was interpreted in the leading English case *Colonial Bank v. Whinney* (5), where Cotton, L. J. said :—

(1) (1878) 10 Ch. D. 408.

(2) *Re Shamsuddin Saheb*, (1912) 22 Mad. L. J. 441 : 15 I. C. 371.

(3) In the matter of *Bungseedhur Khettry*, (1877) 2 Cal. 359.

(4) *Fakeerappa v. Thippauna*, (1915) 38 Mad. 664 : 30 I. C. 950 ; *Mercantile Bank of India v. Official Assignee of Madras*, 56 Mad. 177 : 143 I. C. 641 : A. I. R. 1933 Mad. 207.

(5) (1885) 30 Ch. D. 261.

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"I think the true construction is that the goods must be in his (the bankrupt's) order or disposition for the purposes of, or purposes connected with, his trade or business."

and Lindley, L. J., said :—

"The language 'in his trade or business' means..not merely visibly employed in his trade or business, but required for the purposes of the trade and used for those purposes." This interpretation has been uniformly followed. Accordingly it has been held that shares deposited with his bankers to secure an overdraft by a person who traded as a stock-broker silversmith and watch maker, are not within his order and disposition in his trade or business (1). So if a silk mercer were to hire a yacht for his amusement, the yacht cannot be said to be in his possession in his trade as a silk mercer and will not pass on his insolvency to the official assignee (2) Pictures in the warehouse and counting house of a firm of woollen manufacturers cannot be said to be in the possession of the firm in the firm's trade or business, whatever might have been the case if the firm had been, instead of being woollen manufacturers, picture dealers (3). Stands used in the business of a mantle-maker for the purpose of showing off to advantage the mantles in the shop were held to be goods in the possession of the insolvent in his trade or business. Though the stands could not be sold, yet they had sufficient importance to enter into the value of a trade or business in the mind of an intending lender (4). Where a two seater Jewett car was given to the bankrupt on the hire and purchase system, it was held that as it was pre-eminently intended for private use and was mainly used by the bankrupt as such, it could not be said that the bankrupt was in its possession in his trade or business. Dealing with the case, Mc.Cardie, J. said :

"After he got possession of the car in dispute Pinchin used it from time to time (a) for the purpose of delivering goods to the houses of the customers and (b) for the purpose of getting supplies from the wholesale market. The extent to which the car was used for those purposes was much in dispute before me. In my view the truth of the matter is that the car was used on two or three days in the week either for taking goods to customers or for visits to the wholesale market. The user on such days was for a small part of the day only and not for the whole day. The car was employed somewhat beyond a mere emergency car. But, in my opinion its main function and principal use with Pinchin was that of a pleasure car. He used it regularly as such both on week-ends and other days. No name or advertisement was ever placed on it and it was never altered in any way so as to be convenient for employment as a commercial vehicle (5)."

But where the vehicle hired out by the insolvent, who was a trader, was a lorry which is pre-eminently a commercial vehicle and as such is primarily intended to be used for the purpose of some trade, the vehicle is in the possession of the insolvent in his trade or business (6). The same will be true of a car if it is not merely a pleasant means of conveyance but practically a necessity. Where the insolvent was a P. W. D. contractor and his contract was to supply bricks to the P. W. D.

(1) *Re Jenkinson*, 15 Q. B. D. 441.

(2) *In Re Jenkinson*, (1835) 15 Q. B. D. 441, 444.

(3) *Erp. Love*, (1883) 24 Ch. D. 31.

(4) *Sharman v. Mason*, (1889) 2 Q. B. 679.

(5) *Lamb v. Wright*, (1924) 1 Q. B. 837.

(6) *Gordhan Das v. Official Assignee of the Estate of the Jafferbhoy & Co.*, A. I. R. 1929 Sind. 167 : 117 I. C. 158.

from distant brickfields and for that purpose the insolvent had to use his car every day and in fact he was using the car, it was held that the car was in the possession of the insolvent in his trade or business (1).

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From the cases above cited it also incidentally appears as to what a trade or business constitutes. These words are not defined in the English or the Indian Acts but, provided the purpose of the exercise of the occupation is primarily the acquisition of profit or gain, the words are susceptible of a wide interpretation (2). It also appears to be necessary that the business must be carried on with a view to profit as a means of livelihood and it is not sufficient that profit is made if the primary object was pleasure. Thus a person who occupies a residential property and engages in farming and market gardening for his pleasure and makes a profit by a sale of the surplus produced after supplying his household, is not carrying on a "trade or business" within the meaning of this section (3).

The word 'business' has a wider meaning than the word 'trade.' It would include at least some of the professions (4). A music hall artist whose practice is to contract to produce "terms," she providing costumes and an accompanist, is carrying on business (5). Thus farming is a "business" though not a "trade" (6). A lodging house-keeper has been held to carry on a "business," though he does not provide the lodgers with board (7). A person who being the owner of various hotels successively transfers them to companies in consideration of shares and becomes the managing director thereof, carries on "business" within the meaning of this section (8).

At the date of the presentation of the petition.—The first condition, as remarked above, for the applicability of the sub-section is that goods should be in the possession, order or disposition of the insolvent in his trade or business at the date of the presentation of the petition. If on the date of the presentation of the petition the insolvent has ceased to carry on his trade or business, the present clause will not apply. It is a question of intention to be decided on the evidence, whether the cessation and discontinuance of business or trade is permanent or temporary. If it is temporary with the intention of resuming it, the insolvent is still carrying on a trade or business within the meaning of the section (9). If the goods come into the possession of the insolvent after the date of the presentation of the petition it would seem they are not within the section (10). This view is however inconsistent with the object of the bankruptcy law and its inconvenience is obvious (11). Here it may, however, be noted

(1) *Gordhandas v. Official Assignee of the Estate of Jafferbhoy & Co.*, A. I. R. 1929 Sind. 167.

(2) Williams, page 274 and the authorities cited there.

(3) *Re Wallis*, (1885) 14 Q. B. D. 950.

(4) Williams, Page 274.

(5) *Re a Debtor*, (1927) 1 Ch. 97, *cf. Smith v. Anderson*, 15 Ch. D. 258.

(6) *Harris v. Amery*, (1865) N. R. 1. C. P. 148, at P. 154; *Wheatley v. Smithers*, (1906) 2 K. B. 321.

(7) *Re Harrison*, (1888) 67 L. T. 600.

(8) *Re Clark*, (1914) 3 K. B. (1095) a case under S. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913.

(9) See *Ex parte Salaman*, (1882) 21 Ch. D. 394, a case under S. 6 of the Bankruptcy Act, 1869.

(10) *Lyon v. Weldon*, 2 Bing. 334.

(11) Per Best, C. J., in the same case.

- S. 28** that if after the date of the presentation of the petition but without notice
(3). of it and before the order of adjudication the true owner takes the goods out of the possession of the bankrupt it is a "dealing" within the meaning of S. 55, P. I. A., 1920, and is protected.

Second Condition.—The second condition is that the possession of the goods by the insolvent should be under such circumstances as to make the insolvent the reputed owner thereof. The object of the reputed ownership clause is to prevent the insolvent from obtaining false credit on the basis of goods which do not in fact belong to him. He can have false credit only if such goods are in his possession in such a way as to lead his dealers or customers to infer that he is in fact the owner. That means that he should, for all practical purposes, appear to be the apparent owner of the goods. But unless the goods are so placed in the insolvent's possession as to give rise to that false belief of the insolvent's ownership it cannot be said that the insolvent obtained false credit.

The most authoritative pronouncement on what is reputation of ownership is that of Lord Selborne in *Exp. Watkins* (1). The learned Lord says :—

"The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who took any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors knew anything whatever about the particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about the situation could infer the ownership to be in the person having actual possession."

The bankrupts in that case carried on business in Liverpool as wine and spirit merchants. Prior to their bankruptcy they had sold certain butts of whisky that were then lying in their bonded warehouse to one Watkins. The goods were left there for the convenience of the purchaser, to whom the vendors had given a delivery warrant in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as warehousemen but it was proved to be the usual custom of the wine and spirit trade in Liverpool for goods sold in bond to remain in the possession or under the control of the vendors, in their bonded warehouse, in which they were at the time of sale, until they were required by the purchaser for use. While the butts were still lying in the warehouse, the vendors were adjudged bankrupt. It was

held that the existence of a custom of this nature shown to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee in bankruptcy. S. 28
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Evidence of reputed ownership.—Reputation of ownership is always a question of fact depending on the circumstances of each case (1). Regard is to be had to the nature of the goods, the general course of the trade or business carried on by the bankrupt and the existence of usages and customs of that trade, and the situation of the goods in the bankrupt's possession. Nearly every kind of possession is some evidence of ownership, however slight. There is, however, this difference that where goods once in the possession of the bankrupt as owner continue in his possession, notwithstanding change of ownership, the mere fact of continuance of possession is evidence of reputation of ownership, and of the consent of the true owner thereto (2); but where the bankrupt has never been the true owner, possession may not of itself be evidence that the bankrupt is the reputed owner, and it will then be necessary for the trustee to give other evidence for the fact (3). In this connection it may be noted that the apparent owner should be distinct from the true owner. Where the bankrupt holds the goods in *autre droit*, e.g., as executor, trustee, agent, factor, and in cases of pure trusts, the inference arising from possession is negatived the moment the trust is proved, and it rests on the trustee in bankruptcy to give evidence that the bankrupt was allowed to deal with the goods in a manner inconsistent with his trust. In the cases of trust the bankrupt is the true owner. He becomes apparent or reputed owner only if the beneficiary consents to the user of goods held by the insolvent in a manner inconsistent with the trust in his own trade or business.

In actual life some circumstances are, however, of such frequent occurrence in cases of alleged reputed ownership, that it has come rather to be a matter of law than of fact as to what conclusion such circumstances justify. The clause applies to traders only and in trade circles the course of trade is generally regulated by established usage, custom or practice. The general rule is that proof that goods in the possession of a bankrupt have been entrusted to him for any particular purpose consistent with ordinary legitimate usage will take them out of the operation of the statute. Sometimes it will be the custom of the trade of the true owner, sometimes it will be the custom of the trade of the bankrupt, which will be evidence to negative the reputation of ownership or consent thereto. Thus an established custom or course of trade, where traders have in their possession goods of which they are not the owners, negatives the reputation of ownership arising *prima facie* from the possession of the bankrupt and the consent of the true owner to such ownership (4); and this even though the goods in question are in the warehouse of a third person to the order of the bankrupt, and no delivery order has been given by the bankrupt to the true owner before the commencement of the bankruptcy (5). In the words of Lord Selborne in *Ex parte Turquand* (6), when the existence of a custom notorious in a particular trade or business is proved, the effect of

(1) *Hamilton v. Bell*, (1854) 13 Ex. 545 : 156 E. R. 554.

(2) *Exp. Lovering*, L. R. 9 Ch. 621 ; *Exp. Brooks*, 23 Ch. D. 261.

(3) *Lingard v. Messiter* 1 B. & C. 308 : 107 E. R. 115.

(4) *Exp. Watkins*, L. R. 8 Ch. 520.

(5) *Exp. Vaux*, L. R. 9 Ch. 602.

(6) 14 Q. B. D. 636 at P. 643.

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which is that every one who knows the custom knows the articles to which it is applicable, and which are in the place in which the trade or business is carried on, and which may or may not be the property of the person who is carrying the trade or business, and may or may not be held by him for other persons, then the doctrine of reputed ownership is absolutely excluded as to all articles which are within the scope of the custom. A custom of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the reputation of ownership, be a custom known not only to persons in the same trade, but to others who are likely to be creditors (1). It must be one known in business generally, and not merely to persons dealing in a particular market (2). Such custom may be proved either by reported cases or by evidence of the custom as on a question of fact (3). In England a custom has been successfully set up to exclude the reputation of ownership in many trades. The following are the instances :—

Boarding housekeeper (4), coach-builder (5), clock-maker (6), who usually gets clocks and watches for repair and which remain in his possession ; bookseller to whom third persons send books for sale on commission (7), farmer (8) ; wine merchant (9); wine merchants who hold wine butts of their own as well as of those to whom they have sold in their cellars ; furniture-dealer (10) who has in his shop furniture belonging to others for sale on commission ; iron-mongers, dealing in safes where iron safes are sent by a wholesale dealer to a retail dealer for sale or return or to sell as his agent (11); upholsterer, who gets carriages of others for upholstering (12); piano-hirer, on the three year's system (13); horse dealer to whom horses are sent for sale or return (14); malting agent (15); hop merchant (16); merchants and manufacturer's agents (17); printers hiring machinery (18); custom for wholesalers of antique furniture to send such goods to retailers on sale or return (19).

(1) *Re Hill*, (1875) 1 Ch. D. 503, note ; *Thackthwaite v. Cook*, (1811) 3 Taunt. 487.

(2) *Re Goetz, Jonas & Co.*, (1898) 1 Q. B. 787.

(3) *Exp. Powell*, (1875) 1 Ch. D. 501.

(4) *Re Chapman*, 1 Mans. 415.

(5) *Bertrand v. Payne*, 3 C. and P. 175 ; *Carruthers v. Payne*, 5 Bing. 270.

(6) *Hamilton v. Bell*, 1854, 10 Ex. 545.

(7) *Exp. Greenwood*, 6 L. T. 558 ; *Whitfield v. Brand*, 16 M. and W. 283.

(8) *Re Terry*, 11 W. R. 113 ; *Re Woodward*, 3 Mor. 75 ; *Re James*, 21 T. L. R. 15.

(9) *Exp. Watkins*, L. R. 8 Ch. 520 ; *Exp. Vaux*, L. R. 9 Ch. 602 ; *Exp. Marrable*, 1 Gl. and J. 402.

(10) *Exp. Emerson*, 41 L. J. Bank 20 ; *Exp. Powell*, 1 Ch. D. 501 ; *Craucer v. Salter*, 18 Ch. D. 30.

(11) *Re Lock*, 8 Mor. 51.

(12) *Re Lay*, 54 L. T. 683.

(13) *Re Blanchard*, 8 Ch. D. 601.

(14) *Exp. Wingfield*, 10 Ch. D. 591.

(15) *Harris v. Truman & Co.*, 9 Q. B. D. 264.

(16) *Re Taylor*, 53 L. T. 768.

(17) *Exp. Bright*, 10 Ch. D. 566.

(18) *Re Thackrah*, *Exp. Hughes*, 5 Mor. 235.

(19) *Re Ford*, *Re Stall*, *Brown and Clennell's case*, 1920, 1 Ch. 134.

The burden of proving the custom lies on the person who sets it up (1). It may be proved either by reported cases or by evidence of the custom as a question of fact (2). The court will take judicial notice of a trade custom provided it is very well known. The custom of hotel-keepers hiring their furniture was taken notice of in *Craucer v. Salter*, 18 Ch. D. 30, but it was not taken notice of in *Ex parte Powell* (3). In *Exp. Emerson* (4) it was held that the custom of hiring furniture was so notorious as generally to negative the reputation of ownership. This case was, however, not followed in subsequent cases (5). S. 28
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There is a custom in mercantile firms in Rangoon that they dispose of goods on a commission basis. Where therefore possession of certain goods was held by the insolvent firm as agents for sale on a commission basis and on their note paper they represented themselves as commission agents it was held that the insolvents were not the reputed owners of the goods. In another case it was held that as a commission agent has a disposing power, which he may exercise for his own benefit, over goods entrusted to him for sale, such goods are his property for the purposes of the Insolvency Act, and an interim receiver can take possession of them as his property against him. But where the circumstances clearly indicate that the commission agent is not the reputed owner of goods his principal is entitled to a restoration of the goods (6). Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business; they cannot be called the reputed property of the goldsmith. They are the jewels of the bailor and so being easily identifiable cannot vest in the Receiver in case of the goldsmith's insolvency. In an Indian case an attempt was made to prove a custom for retail dealers in jewellery to receive articles for sale on commission but the attempt failed (7).

Apart from a well established custom in the trade, the goods may be in such a situation as to negative the reputed ownership of the insolvent; or the change of ownership may be attended with such a notoriety as to leave no doubt about the title of the real owner, even though the goods may remain in the possession of the insolvent. A sale by public auction in execution of a decree has been held to give sufficient notoriety to the change of ownership so as to exclude reputation of ownership (8). An attempted sale by the mortgagee, the goods not being advertised to be sold as his, is not sufficient (9). Where a person buys goods from one, who afterwards becomes insolvent, marks them with his name or initials and then leaves them in the possession of the vendor, it has been held that these facts are not sufficient to make the change of ownership so notorious as to exclude the evidence arising from possession of the insolvent (10). Similarly where the relation of principal and factor is notorious,

(1) *Re Horn*, (1886) 3 Mor. 51, 56.

(2) *Exp. Powell*, (1875) 1 Ch. D. 501.

(3) 1 Ch. D. 501.

(4) 41 L. J. Bank. 20.

(5) *Exp. Brooks*, 23 Ch. D. 261; *Re Tabor*, (1920) 1 K. B. 808, *Re Kaufman Segal and Domb*, 1923, 2 Ch. 89

(6) *In re Messrs Kadibhoy Ismail Ji Lotia*, 11 Ind. Cas. 14.

(7) *Re Murray*, (1878) 3 Cal. 58.

(8) *Kidd v. Robinson*, (1802) Bos. and P. 59: 126 E. R. 1155.

(9) *Reynolds v. Hall*, (1859) 4 H. and N. 519: 157 E. R. 943.

(10) *Lingard v. Messiter* (1823) 1 B. and C. 308: 107 E. R. 115.

- S. 28** goods entrusted to a factor, or the proceeds of those goods, so long as
(3). they can be earmarked, and so long as the principal has not consented to look to the bankrupt as a mere debtor for the proceeds, will not generally pass to the trustee on the bankruptcy of the factor (1), though it seems that in order to avail, the relation should be notorious (2).

Third condition.—It is provided that the goods should be in the possession of the insolvent by the permission and consent of the true owner, under such circumstances as to make the insolvent the reputed owner thereof. It means that the consent of the true owner should extend not only to the possession of the goods by the insolvent in his trade or business but also that he should have consented to the insolvent's reputation of ownership or to the circumstances from which it is to be inferred. That the consent of the true owner to the reputation of ownership is necessary to apply the clause was not fully recognised in all the cases; but it is now fully established by the judgment of the Court of Appeal in *re Watson & Co.* (3), where the law is thus stated:—

"In our opinion it is essential before the Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise. We think that the cases of *Load v. Green*, 15 M. and W. 216, and *Smith v. Hudson*, 34 L. J. Q. B. 145, fully established this proposition. Blackburn, J., in his judgment in *Smith v. Hudson*, said: '*Load v. Green* decides that the true owner as such must consent that the other side should be reputed owner, not being true owner.' The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 1 Jac. I. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord Redesdale in *Joy v. Campbell*, 1 Sch. and Lef. 328 (a case which has been approved and acted on again and again; see *Belcher v. Bellamy*, 2 Ex. 343; *Hamilton v. Bell*, 10 Ex. 545, and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods; but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise."

The clause pre-supposes that the true owner must be distinct from the reputed owner, that is to say, there should be an apparent owner of the goods as well as a true owner who has left the goods in possession of the apparent owner. We proceed to consider all these conditions under separate headings.

1. Consent and permission.—Consent must be a real consent. The word 'consent' has been defined in section 13 of the Indian Contract Act, and consent is free consent when it is not obtained by coercion, undue influence, fraud, misrepresentation or mistake. See section 14, Indian

(1) *Exp. Boden*, 28 L. T. 174; *Exp. Bright*, 10 Ch. D. 566.

(2) *Exp. Fawcus*, 3 Ch. D. 795.

(3) (1904) 2 K. B. 753.

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Contract Act. Thus it has been held that goods obtained by an insolvent by fraud (1), and goods sent to him by mistake (2), are not in his possession with the true owner's consent, and they will not be regarded as being in his reputed ownership unless the goods were left in his possession for a considerable time after the fraud or mistake was discovered. In the latter case the consent of the true owner will be presumed from his acquiescence. Again, in order that consent may be good consent, it is necessary that the true owner should be legally capable of giving consent (3). Thus the true owner should not be an infant (4), or a person of unsound mind (5). Corporations and companies are capable of entering into contracts and giving their consent thereto only when they comply with certain statutory conditions or conditions laid down at the time of their constitution. In all those cases where they are incapable of consenting but have in fact consented to the remaining of their goods in the possession of the insolvent, the goods will not pass to the trustee in bankruptcy (6).

2. Consent should be to the possession of goods in the insolvent's trade or business.—The leading English case on this point is *Lamb v. Wright* (7). In that case the true owner of the car had consented to the possession of the car by the insolvent for domestic and non-business purposes. It was held that the car was not within the reputed ownership of the insolvent merely because the insolvent, without his knowledge or consent, had used it in and for his trade or business. This case has been noted before. Where, however, a true owner gave a motor lorry on hire to an insolvent, who was a trader, and knew that the insolvent was to use it for the purposes of his business, it was held that the lorry was in possession of the insolvent in his trade or business with the consent of the true owner (8).

Consent to the reputation of ownership.—As stated before, the consent of the true owner should be to the reputation of ownership or the circumstances from which reputation may be inferred. Whether there is a reputed ownership with the consent of the true owner such as to bring the goods within the meaning of the section is a question of fact to be determined by a consideration of the circumstances of each case (9). The question in each case will be: Did the true owner consent to the possession by the insolvent under such circumstances that persons dealing with him would be entitled to assume that the insolvent was the owner of the goods in his trade or business? It is obvious that in deciding this question as to the consent of the true owner one cannot leave out of

(1) *Load v. Green*, (1846) 15 M. & W. 216: 153 E. R. 828; *Sinclair v. Stevenson*, (1825) 2 Bing. 514, 517: 130 E. R. 404, 406.

(2) *Ex parte Barnett*, (1876) 3 Ch. D. 123

(3) *Exp. Ford*, 1 Ch. D. 521.

(4) Section 11, Ind. Contract Act; *Re Mill's Trusts*, 1895, 2 Ch. 564.

(5) Sec. 12, Indian Contract Act.

(6) See in this connection *Great Eastern Railway Co. v. Turner*, L. R. 8 Ch. 149.

(7) (1924) 1 K. B. 857.

(8) *Gordhandas v. Official Assignee of the Estate of Jafferbhoy & Co.*, A. I. R. 1929 Sind 167.

(9) *Hamilton v. Bell*, 10 Ex. 545; *Watson v. Peache*, 1 Bing. M. C. 327; *Whitfield v. Brand*, 16 M. & W. 282; *Priestley v. Pratt*, L. R. 2 Ex. 101; *Horn v. Baker*, per Lawrence, J., 9 East. 215; *Load v. Green*, 15 M. & W. 216; *Re Rawbone's Trusts*, 26 L. J. Ch. 588; *Exp. Watkins*, L. R. 8 Ch. 520.

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consideration the true relation of the parties (1). Consent to possession by the bankrupt under circumstances not naturally justifying such possession is itself strong evidence of consent to reputation of ownership, for it is difficult for the person to maintain that he did not intend the natural consequences of his own act (2). Where goods are not in the custody of the bankrupt himself, but are lying to his order at a wharfinger's or other agent's, the true owner should, if he had the opportunity, give notice to the latter; and, if he does not, this will be strong evidence of his consent to the reputed ownership of the bankrupt (3). The absence of such notice will not have that effect where there has been no opportunity of giving it (4).

With respect to trade or business debts the fact of no notice having been given to the debtor seems conclusive evidence, where there is an opportunity of giving such notice, of the consent of the true owner to the debt remaining in the reputed ownership of the bankrupt (5). The inference of consent arising from the omission to give notice can be rebutted only when the true owner takes every possible step to obtain possession of the debt, or if the failure to obtain possession is not attributable to any fault of his own (6). Thus where on November 29, mortgagees of book debts appointed a receiver who on December 17 had notice of an act of bankruptcy by a debtor, who was adjudged bankrupt on his own petition on December 29, and between December 22 and December 29 the receiver gave notice to the book debtors, it was held that the book debts were in the order and disposition of the bankrupt by consent of the true owner, for the receiver could have given notice between November 29 and December 17 (7). No notice is necessary if the person or trustee who owes the debt has actual knowledge of the assignment or encumbrance (8). The reason why actual knowledge by the debtor or trustee takes the subject matter out of the section is not because it negatives the consent of the true owner, but because the knowledge so affects the debtor or trustee as to take the debt or interest out of the order or disposition of the bankrupt. The notice which needs be given is not such as to give knowledge of the assignment in casual conversation but should be given in such a way that a reasonable man or an ordinary man of business would act upon the information and regulate his conduct by it (9). The knowledge must be such that after acquiring it, the person owing the debt would be guilty of a breach of trust if he paid, by direction of the assignor, adversely to the right of the assignee (10). The fact that it was the duty of the bankrupt, *e.g.*, as the solicitor of the assignee, to give the requisite notice does not disprove consent if no notice was given (11).

(1) *Re Watson & Co.*, (1904) 2 K. B. 753, 757. See also *Re Hamilton Young & Co.*, (1905) 2 K. B. 772.

(2) *Williams*, page 286.

(3) *Exp. Stewart*, 34 L. J. Bank 6; *Knowles v. Horsfall*, 5 B. & A. 134.

(4) *Acraman v. Bates*, 29 L. J. Q. B. 78; *Burn v. Carvalho*, 4 Myl. and Cr. 690; *Exp. Vaux*, L. R. 9 Ch. 602.

(5) *Ryall v. Rolle*, 1 Ves. 348, 375; *Edwards v. Martin*, L. R. 1 Eq. 121; *Re Tillet*, 6 Mor. 70; *Rutter v. Everett*, (1895) 2 Ch. 872.

(6) *Rutter v. Everett*, (1895) 2 Ch. 872.

(7) *Re Neal*, (1914) 2 K. B. 910; for other instances see *Day v. Day*, 1 DeG. & J. 144 and *Re Wethered*, (1926) Ch. 167.

(8) *Tibbets v. George*, 5 A. & E. 107; *Exp. Stewart*, 34 L. J. Bank. 6.

(9) *Lloyds v. Bankes*, L. R. 3 Ch. 490.

(10) *Exp. Agra Bank*, L. R. 3 Ch. 555; *Exp. Boulton*, 1 DeG. & J. 163; *Edwards v. Martin*, L. R. 1 Eq. 121.

(11) *Bartlett v. Bartlett*, 1 DeG. & J. 197

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The mortgagee, who, by the terms of the mortgage, was not at the time of the bankruptcy entitled to possession, can consent to a reputation of ownership if the mortgagee has of his own accord put himself into a position in which he has no immediate right to the possession of the goods, and has thereby consented to the reputed ownership of the bankrupt until the happening of the default, or other event, entitling the mortgagee to immediate possession (1). Where goods are sent on sale or return, all that the true owner consents to is that the bankrupt shall have possession with an option of returning the goods within a reasonable time (2); and although if the customer became bankrupt after such time had elapsed without having returned the goods they would pass to the trustee, it would not be so because they were in the reputed ownership of the bankrupt, but as being his property (3).

True owner.—The clause postulates that the insolvent should be the reputed owner of the goods with the consent of the true owner. The insolvent must not be the true owner or as much the true owner as another person (4). Thus where the insolvent is an owner jointly with another and goods are in his possession, the property in the goods will not pass to the trustee in bankruptcy under the clause. This will be the case in a partnership and it is immaterial whether the partner other than the insolvent one is an infant partner or a dormant partner. In *Reynolds v. Bowley* a brother and sister carried on business in partnership in the brother's name, the sister being only a dormant partner. On the bankruptcy of the brother it was held that the sister's share did not pass to the trustee because the bankrupt was as much the true owner of the stock as the sister was and also because the bankrupt was not in sole possession thereof. Where, however, one partner allows goods, which belong to him and not to the partnership (5), to remain in the possession of the firm, the goods will be treated on the insolvency of the firm as their joint estate. Here the true owner is one of the partners in his individual capacity and the apparent owner is the firm having possession through its partners jointly. Similarly the property of the firm will be within the reputed ownership of one partner, who is allowed to remain in possession of the goods in his individual capacity and separately. For detailed notes see commentary under section 61.

The words 'true owner' have been defined as meaning a person who is entitled to determine the appearance of the beneficial interest of the insolvent (6). A true owner may be a full owner as where he has lent his goods for use to the insolvent, or let them out on hire to him, or sent them to his shop for sale, or, having bought the goods from the insolvent, has allowed the insolvent to continue in possession thereof. The true

(1) *Spackman v. Miller*, 12 C. B. N. S. 659; *Re Ginger*, (1897) 2 Q. B. 461, followed and approved in *Hollinshead v. Egan*, (1913) A. C. 564; *Re Weibking*, (1902) 1 K.B. 713.

(2) *Smith v. Hudson*, 34 L. J. Q. B. 145, *per* Blackburn, J., page 155; and see *Exp. Wingfield*, 10 Ch. D. 591; and *Re Ford*, *Re Stall*, *Brown and Clennell's case*, (1929) 1 Ch. 134.

(3) *Gibson v. Bray*, 8 Taunt. 76; *Moss v. Sweet*, 16 Q. B. 493; S. 24, Indian Sale of Goods Act, Act 3 of 1930.

(4) *Hamilton v. Bell*, (1854) 10 Ex. 545; 156 E. R. 554; *Reynolds v. Bowley*, (1867) L. R. 2 Q. B. 474.

(5) (1867) L. R. 2 Q. B. 474.

(6) *Ghulam Ali T. Mandvi Walla v. Official Assignee*, A. I. R. 1937 Sind 50.

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owner may, however, not be the full owner ; the interest of the true owner may be a legal and equitable or a merely equitable interest (1). In 25 Madras 406, Bhashyam Aiyangar, J., remarked that a charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as a mortgagee thereof, and if he allows the mortgagor or the person creating the charge to remain in possession under circumstances which will lead to his being the reputed owner and to his being able to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the official assignee. In *Colonial Bank v. Whinney* (2), there was an equitable mortgage of shares by the deposit of the share certificates and bank transfer, the registered share-holder remaining the legal owner, it was held that the depositor got an equitable interest and that another person could be the reputed owner of that equitable interest. By an agreement in writing the insolvent purported to give to the garnishee his motor car as security for an advance by him of Rs. 3,000. It was a term of the agreement that the insolvent should have the right to use the car and should keep it in good order and deliver it up on demand. Here the legal owner of the property throughout was the insolvent but the garnishee was the owner of an equitable interest in the property. It was held that there can be a reputed owner of an equitable interest and that reputed owner can be the insolvent himself, that is, the legal owner of the property (3). Thus a charge on goods or an hypothecation of goods stands on the same footing as a mortgage. In such cases the mortgagee or the charge holder is the true owner. This will be so, although by agreement between the parties the mortgagee has precluded himself from taking immediate possession of goods and determining the appearance of ownership in the mortgagor. In cases of trust or in cases of relationships in the nature of trusts the trustee is the true owner of trust property within the reputed ownership clause (4). Where the insolvent is the trustee and he deals with the trust property in a manner consistent with the trust, the beneficiaries have no right to disturb his possession. Where the insolvent executed a pronote in exchange for delivery of goods and the pronote contained a trust receipt stating explicitly that the property in goods or the proceeds thereof was to remain in the sellers until payment, the property in the goods did not pass and the goods remained in his reputed ownership (5). Where the beneficiaries permit the trustee to deal with the trust property in a manner inconsistent with the provisions of the trust, the property may be deemed to be in his possession as the reputed owner thereof with the consent of the beneficiaries and it will pass on the insolvency of the trustee to the official assignee (6). In such a case the beneficiary becomes the owner of an equitable

(1) *Exp. Union Bank of Manchester*, L. R. 12 Eq. 354 ; *Exp. Barry*, L. R. 17 Eq. 113 ; *Colonial Bank v. Whinney*, 11 App. Cas. 426, 434 ; *Punitha Velu Mudaliar v. Bhashyam Aiyangar*, (1902) 25 Mad. 406 : 12 Mad. L. J. 282 ; *The Mercantile Bank of India, Ltd., Madras v. The Official Assignee of Madras*, (1916) 39 Mad. 350 : 35 Ind. Cas. 942 ; *Mercantile Bank of India v. Official Assignee of Madras*, 56 Mad. 177 : 143 I. C. 641 : A. I. R. 1933 Mad. 207 ; *Ghulam Ali v. Official Assignee*, A. I. R. 1937 Sind 50.

(2) L. R. 11 App. Cas. 426.

(3) *Aburubammal v. Official Assignee of Madras*, A. I. R. 1924 Mad. 214 : 79 I. C. 809 : 47 Mad. 215.

(4) *Joy v. Campbell*, (1804) 1 Sch. & L. 328 ; *Re Nripendra Kumar Bose*, A. I. R. 1930 Cal. 171 : 56 Cal. 1074.

(5) *Nripendra Kumar Bose* *supra*.

(6) *Fox v. Fisher*, (1819) 3 B. & Ald. 135 : 106 E. R. 612

interest in the property. This will also be the case where the beneficiary himself creates the trust and chooses to leave the indicia of the property in the hands of the trustee, or where no *bona fide* purpose for the trust can be shown (1). Where the trustees do not execute the trust or do not know of the trust-deed or decline to act, the settlor remains the true owner of the property, and if the property is allowed to remain in the reputed ownership of the trustees, it will pass to the official assignee on the bankruptcy of the trustees (2).

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(3)

The same principle will apply to the case of goods in the hands of an executor¹(3), an executor *de son tort* (4) or administrator (5).

Where the beneficiaries are in possession of trust property, and such possession is in accordance with the trust, they are not in possession with the consent of the trustee, who is the true owner, and the reputed ownership clause does not apply (6). It is otherwise if the trustee consents to the goods being in the order and disposition of the insolvent beneficiaries adversely to the trust (7). In *Shuttleworth v. Hernaman*, 1 DeG. and J. 322, a landlord claiming a lien on machinery in a mill for future rent under a covenant by the tenant to keep always a minimum of £ 3,000 worth on the premises, was held to be the true owner for this purpose. And so was the building owner under a contract which provided that all the used materials and plants brought on the land should be deemed to be annexed to the freehold (8). Where, however, the contract was that the plant and materials brought on the ground by the builders should be considered the property of the building owners, and should not be removed without the license of the architect, that the building owners were not to be answerable for any loss, or damage to them, and that in certain events they should be forfeited, it was held that the building owners were not the true owners, but they could forfeit the goods, notwithstanding the bankruptcy of the builders (9). And in *Exp. Bright*, 10 Ch. D. 566, it was held that an agreement that factors "shall sell your goods at such an advance on your prices as we may deem right" does not constitute the factors the reputed owners of goods so in their possession for sale.

Determination of consent.—In order that the clause may apply it is necessary that the goods should be in the possession of the insolvent on the date of the presentation of the petition with the consent of the true owner. If the consent has been determined or withdrawn before that date by the true owner the effect is to take goods out of the order and disposition of the insolvent without any change of possession. The law is that if the true owner *bona fide* demands possession with a view to taking possession, and from no fault of his own, he fails to get it, the goods are

(1) *Exp. Burbridge*, 1 Dea. 131; *Exp. Harrison*, 3 Dea. 185; *Kitchen v. Ibbetson*, L. R. 17 Eq. 46.

(2) *Re Mill's Trusts*, (1895) 2 Ch. 564.

(3) *Re Fells*, (1876) 4 Ch. D. 509.

(4) *Fox v. Fisher*, (1819) 3 B. & Ald. 135; 106 E. R. 612.

(5) *Kitchen v. Ibbetson*, (1873) L. R. 17 Eq. 46.

(6) *Joy v. Campbell*, 1804, 1 Sch. & Lef. 328, *per* Lord Redesdale; *Ex parte Martin*, (1815) 2 Rose, 331; *Earl of Shaftsbury v. Russell*, (1823) 1 B. & C. 666; 107 E. R. 244.

(7) *Darby v. Smith*, (1798) 8 T. R. 82; 101 E. R. 1278; *Caffrey v. Darby*, (1801) 6 Ves. 488; 31 E. R. 1159.

(8) *Re Weibking*, (1902) 1 K. B. 713.

(9) *Re Keen & Keen*, (1902) 1 K. B. 555.

S. 28 not within the possession of the bankrupt with his consent (1). This seems
(3). to be so even though the demand did not reach the bankrupt or was not
 complied with until after he had committed an act of bankruptcy (2).
 The insolvent may after demand refuse to deliver the goods (3), or he may
 refuse admission to or forcibly eject the true owner or his agent sent to
 take possession of the goods (4), or sent to catalogue the goods with a view
 to selling them (5). In *Smith v. Topping* (6), the plaintiff was the true
 owner of three pipes and three hogsheads of wine. This wine had been
 deposited by the plaintiff in the cellars of the bankrupt and had remained
 in his possession as its reputed owner with the consent and permission
 of the plaintiff. The true owner, hearing that the insolvent was in difficul-
 ties, sent his clerk to the respondent's house and demanded the wine. The
 insolvent was at the time absent, but late in the day, the clerk made a
 further demand from the insolvent himself. The insolvent refused to give
 possession of the wine, and on the following day he committed an act of
 bankruptcy. It was held that his demand for possession was sufficient to
 establish that thereafter the wine did not remain in the possession of the
 reputed owner by the consent and permission of the true owner. Where
 a bill of sale holder over chattels in two houses instructed a broker
 to take possession in both, and the broker took possession in one house
 before the act of bankruptcy, but did not take possession of the other till
 after the bill of sale holder had notice of the act of bankruptcy, this
 amounted to a determination of consent in respect of the property in
both the houses. It was also held there that where the true owner had
 done all he could, short of a forcible entry, to take possession, though no
 demand had been made, consent was negatived (7). In *In re Ambrose*
Summers (8), the mortgagee actually attempted to take possession of the
 goods but was resisted by the insolvent; he then placed durwans at the
 entrance of the insolvent's business premises; it was held that enough was
 done to show that the business or stock in trade of the insolvent was not
 in the order and disposition of the insolvent. Where the goods are in
 possession of a warehouseman a notice to the insolvent alone is sufficient
 to determine consent, though to determine the possession of the insolvent,
 notice to the warehouseman is also necessary. Thus in *Ex parte Ward*
 (8), W bought from C whisky in bond, to remain in bond rentfree for
 twelve months, after which warehouse rent was to be paid. The whisky
 lay to order at a dock warehouse. On the 19th of February, 1872, W
 wrote to C directing him to forward a specified hogshead of whisky,
 and enclosing a cheque of sufficient amount to pay duty and clear the
 whisky. On the 26th, C filed a petition for liquidation having retained

(1) *Jethanand v. Official Assignee*, A. I. R. 1931 Sind 40 : 131 I. C. 908
 (Demand was not proved on facts.); *Official Assignee v. Mohamed E.*
Naikwarah, A. I. R. 1924 Rang. 27 : 1 Rang. 153; *Aburubammal v. The*
Official Assignee of Madras, A. I. R. 1924 Mad. 214 : 47 Mad. 215 : 79 I. C.
 809; *Smith v. Topping*, (1833) 5 B. & Ad. 674 : 110 E. R. 939.

(2) *Exp. Ward*, L. R. 8 Ch. 144; See *Jethanand Harumal v. Official*
Assignee supra, where a different opinion has been expressed.

(3) See note No. (1) above.

(4) *Exp. Montague*, (1876) 1 Ch. D. 554; *Re Ambrose Summers*, (1896)
 23 Cal. 592; *Exp. Harris*, (1872) L. R. 8 Ch. App. 48.

(5) In the matter of *R. Brown*, (1886) 12 Cal. 629, 637, 638.

(6) 110 E. R. 939.

(7) *Re Eslick*, 4 Ch. D. 496.

(8) 1896, 23 Cal. 592.

(9) 8 Ch. App. 144.

the cheque without paying the duty or in any way complying with W's directions. It was held that the goods had been validly taken out of the possession of the insolvent. In the case of goods at sea (1), the true owner can determine his consent by giving notice to the agent in possession of the goods. The same can be done with respect to goods in the hands of an agent at a foreign port (2). Where S bought and paid for goods lying at a wharf before the bankruptcy of his vendor, and received from the vendor's agent delivery orders but did not present the latter till after a receiving order was made, when delivery was refused by the wharfinger on the instructions of the vendor's agent, who claimed a lien, it was held that the goods were not within the reputed ownership of the vendor (3). But a mere intention to demand the goods and to get possession of them is not enough to exclude the clause (4).

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(3).**

In the case of trade debts notice of assignment is necessary to the person from whom the insolvent is to receive payment of the debt. Assignment of a debt coupled with notice of the assignment is equivalent to taking possession of the debt by the assignee and it takes the debt out of the reputed ownership of the insolvent (5). If no such notice is given the debt will pass to the official assignee as part of the insolvent's property and become divisible among his creditors (6). The notice must be an effective notice, that is to say, such a notice as would prevent the person who owes the debt from paying any one but the party giving notice (7). In the case of companies, the question arises whether the notice or knowledge of assignment was given to the person, to whom it was given, in his character as officer of the company (8).

No notice is, however, required to take bills of exchange, promissory notes and other negotiable instruments out of the reputed ownership of the bankrupt, because they are transferable by endorsement and delivery without notice to the parties liable (9). Thus, if debtors to a bankrupt accept bills or give promissory notes for their debts, reputed ownership is excluded, because by accepting the bills, the debtors have notice of assignment, and agree to pay the debts, if necessary, not to the bankrupt but to the holder of the bills; but mere unaccepted drafts drawn by the bankrupt on his debtors will have no such effect (10).

Determination of consent after the presentation of the petition.—

See S. 55, P. I. Act.

The clause does not apply to secured creditors.—It has been so

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- (1) *Burn v. Carvalho*, (1839) 4 Myl. & Cr. 690.
 - (2) *Acraman v. Bates*, (1860) 29 L. J. Q. B. 78.
 - (3) *Simeons v. Durand*, (1928) B. & C. R. 19.
 - (4) *Spackman v. Miller*, 12 C. B. N. S. 659; *Hornsby and Miller*, 1 E. & E. 192; *Brewin v. Short*, 24 L. J. Q. B. 301. See also *Jethanand Harumal v. Official Assignee*, 131 I. C. 708; A. I. R. 1931 Sind 40.
 - (5) *Re Goetz, Jonas & Co.*, (1898) 1 Q. B. 787, 794.
 - (6) *Re Tillett*, (1889) 6 Mor. 70; *Butter v. Everett*, (1835) 2 Ch. 872; *Bhavan Mulji v. Kavasji Jehangir*, (1878) 2 Bom. 542; *Punithavelu Mudaliar v. Bhashyam Ayyangar*, (1902) 25 Mad. 406, 412; *Dhanrajmal Kishundas v. Official Assignee*, 131 I. C. 130; A. I. R. 1931 Sind 44.
 - (7) *Punithavelu Mudaliar v. Bhashyam Ayyangar*, (1902) 25 Mad. 406, 412.
 - (8) *Exp. Bolton*, 1816, 2 Rose 389; *North British Assurance Co. v. Hallett*, 7 Jur. N. S. 1263; *Alletson v. Chichester*, L. R. 10 C. P. 319.
 - (9) *Belcher v. Campbell*, 8 Q. B. 1.
 - (10) *Re Goetz, Jonas and Co.* (1898) 1 Q. B. 787.

S. 28 held by the High Courts of Calcutta (1), Allahabad (2) and Sind (3).
(3).

As pointed out before, in this the law under the Provincial Insolvency Act differs from the law under the English bankruptcy and the Presidency-towns Insolvency Acts. It is doubtful whether the difference was intentionally made by the legislature. The reasons for this have been explained by Mr. Mulla in the following terms :

"What happened was that in the Bill as it stood before it was referred to the Select Committee, what is now sub section (6), which saves the rights of secured creditors, stood as a proviso to what is now sub-section (2). The bill as originally drafted did not contain any provision as to reputed ownership or after-acquired property. These were inserted in the section by the Select Committee. While re-casting the section the Select Committee placed the clauses relating to reputed ownership and after-acquired property immediately after what is now sub-section (2), and detached from that sub-section the proviso relating to the rights of secured creditors, and placed it where it now stands. Nobody seems to have considered what the effect of that change would be. It was not as if the Select Committee deliberately placed the clause relating to the rights of secured creditors after the reputed ownership clause. By far the largest number of transactions to which the doctrine of reputed ownership applies are mortgages of goods. The section as it stands does not apply to such transactions. The operation of the clause is confined to cases where the true owner has lent his goods for use to the insolvent, or let them out on hire to him, or sent them to his shop for sale, or having bought the goods from the insolvent has allowed the insolvent to continue in possession thereof, and such other cases. Cases, however, of this kind are very rare in the mufassal. The result is that the reputed ownership clause has almost become a dead letter in the mufassal. But I for one do not regret this result. The doctrine of reputed ownership has operated very harshly in several cases, and it has worked greater evil than good. It is not recognized in several systems of Bankruptcy Law. If, however, the clause is to stand in the Statute Book of India as a living clause, the whole section should be recast. The section as it now stands is like a Cheap Jack's shop packed with varieties of clothes some of which are for mere show.

"Further, the section of the Presidency-towns Insolvency Act contains a proviso whereby it is enacted in effect that choses in action other than trade debts are not goods within the meaning of the section. There is no such provision in the Provincial Insolvency Act. Are choses in action other than trade debts to be regarded as goods within the meaning of section 28 (3) of the Provincial Insolvency Act? We do not think that that was the intention. This, however, is another instance of an attempt to shorten the Act without regard to precision."

We have cited above cases of mortgagees to illustrate the principles of the clause. It was unavoidable because under the English law and the Presidency-towns Insolvency Act the clause applies to them and in most cases the rights of secured creditors were opposed to the trustee in bankruptcy. The principles, however, remain the same and the cases cited above should be read in the light of the above remarks.

(1) *Shamal Das Kschetry v. Phanindra Nath*, A. I. R. 1923 Cal. 532 : 72 I. C. 467.

(2) *Moti Ram v. Rodwell*, A. I. R. 1923 All. 159 : 76 I. C. 749.

(3) *Wyse Re, Chowksey Ex parte*, 17 I. C. 31 (Sind).

Proof by true owner.—Under the Presidency-towns Insolvency Act the second proviso to the corresponding section of that Act gives the true owner a right of proof for the price of the goods which he has lost under the reputed ownership clause. The law in England is to the same effect (1). The law under the Provincial Insolvency Act is, it is submitted, the same.

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(4).

Questions of reputed ownership are within the jurisdiction of the court in bankruptcy.—Where there is a dispute as to whether the goods are within the reputed ownership of the bankrupt, the trustee must apply for an order declaring him to be entitled to the goods under this section, and the court, in the exercise of its jurisdiction under section 4, will determine the question of fact, and make the order accordingly. This is a question which arises in consequence of bankruptcy and which could not otherwise have arisen between the bankrupt insolvent and a third person. It is doubtful if the third person can bring his suit in the ordinary courts, unless the insolvency court makes a direction to that effect.

Sub-section 4 : After-acquired property.—Under sub-section (2) the whole of the property of the insolvent, which he owns on the date of adjudication, vests in the receiver and becomes divisible among his creditors. Under the sub-section under consideration property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge vests forthwith in the Receiver, and becomes divisible amongst his creditors, just as property existing on the date of the order of adjudication becomes divisible under sub-section (2). After-acquired property is to be determined, therefore, by the point of time when it is acquired. Sums periodically falling due under a right already acquired such as an allowance or annuity, or instalments due on an instalment bond or decree can hardly be treated as after-acquired property in respect of instalments falling due after the insolvency (2). There are numerous ways in which a person may acquire property. He may get it by inheritance, by way of gift or under a settlement or a will. Again, it may consist of earnings acquired after the order of adjudication by the insolvent himself or it may consist of the profits of trade or business carried on by the insolvent after the order of adjudication and before his discharge. The Act however does not make any distinction between the two kinds of property. The same rules which determine as to whether a particular property is divisible amongst the creditors of the insolvent apply equally to both the kinds of property (3).

Vesting of after-acquired property under the English law.—It was provided by section 15 (2) of the Act of 1869 that the property of the bankrupt divisible among his creditors shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. It is now reproduced in section 38 (2) (a) of B. A., 1914. Section 47 of the present Act re-enacts section 11 of the Act of 1913 which marked a deliberate departure from the

(1) *Re Button*, (1907) 2 K. B. 180.

(2) *Nilkanta Subudhi v. Ramachandra Das*, 137 I. C. 394 : A. I. R. 1932 Mad. 250.

(3) *Jalaun Dt. Co-operative Bank at Orai v. Official Receiver, Jhansi*, 156 I. C. 751 : A. I. R. 1935 All. 279.

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existing law. The law, as it existed before section 11 of the Act of 1913, was that after-acquired property continued in the bankrupt until the assignee in bankruptcy intervened. Though the wording of the section dealing with the vesting of after acquired property, when read by itself, implied that after-acquired property vested in the official assignee in precisely the same manner as property existing before adjudication; but by judicial decisions a distinction was made between the two kinds of property in the mode of their vesting. The bankrupt continued to be the owner of after-acquired property till the assignee determined his title by intervention. Thus it was held that an undischarged bankrupt could maintain an action with relation to after-acquired property (1), or sue on any contract made with him after bankruptcy, or for damages for breach after bankruptcy of a contract for personal service made before and remaining unexecuted at the date of bankruptcy (2). As regards the insolvent's dealing with after-acquired property by way of transfer the law was laid down in very broad terms by the Court of Appeal in *Cohen v Mitchell* (3) as follows :—

“ Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.”

The facts of *Cohen v. Mitchell* (L. R. 25 Q. B. D. 262) were as follows :—One Arthur Cohen became bankrupt, and subsequently, and before he obtained his discharge, carried on business in buying and selling agricultural machines, and, to enable him to do so, obtained advances of several sums of money from Hyam Cohen. One Foale seized some of the machines, and the bankrupt brought an action against him for wrongful conversion of the machines so seized. The bankrupt, having no money with which to carry on the action, assigned the cause of action to Hyam Cohen in consideration of the money already due to him and the further sum necessary to carry on the action. The action resulted in a verdict for the plaintiff. The trustee in bankruptcy of Arthur Cohen then intervened and demanded the money of Foale as part of the property of the bankrupt. Hyam Cohen also claimed the amount under the assignment. Foale consequently interpleaded and paid the money into Court, whereupon the issue was tried between Hyam Cohen as plaintiff, and the trustee as defendant. It was with reference to these circumstances that the Court of Appeal laid down the proposition quoted above “ in terms wider than it had been laid down before ” in order to preclude the trustee from disaffirming retrospectively what had “ otherwise been validly done by the bankrupt.”

This doctrine, however, was held not to apply to real estate (4). The above rule was also interpreted so as to confine its operation only to the protection of persons dealing with the bankrupt and his personal estate in the ordinary course of business where the bankrupt carrying on

(1) *Web v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. and P. 44.

(2) *Cumming v. Robuck*, Holt. 172; *Herbert v. Sayer*, 5 Q. B. 965; *Jameson v. Brick and Stone Co.*, 4 Q. B. D. 208; *Bailey v. Thurston & Co., Limited*, 1903, 1 K. B. 137.

(3) 25 Q. B. D. 262.

(4) *Re New Land Development Association and Gray*, (1892) 2 Ch. 138; *Bird v. Philpott*, (1900) 1 Ch. 822; *Official Receiver v. Cooke*, (1906) 2 Ch. 661.

business without interference by the trustee. It was also held inapplicable to a case of second bankruptcy. Thus where an undischarged bankrupt traded without the knowledge of his trustee, and acquired property, and then became bankrupt a second time, it was held that the property so acquired must be treated as assets in the first bankruptcy and the trustee in the second bankruptcy was entitled only to the surplus left after payment in full of the debts and expenses under the first bankruptcy and to that too in so far as the bankrupt had not effectually dealt with before the second bankruptcy (1).

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The law in England has now been settled and codified in section 47, B. A., 1914, and section 3 of the Act of 1926. S. 47 adopts the principle of *Cohen v. Mitchell* and extends its operation to real estate also, but at the same time imposes a duty upon the banker to inform the Board of Trade or the trustee in bankruptcy in certain cases. S. 3 deals with the case of second or subsequent bankruptcies.

The rule of *Cohen v. Mitchell* is still the law and we proceed to note decisions where it has been applied. In order that a transaction by a bankrupt in respect of after-acquired property be valid against the trustee it is necessary that the person so dealing should have taken the property for value and acted in a *bona fide* manner. Thus in a case a bankrupt while undischarged effected policies on his life and died intestate, and his administrator, without notice of the bankruptcy, distributed policy moneys amongst the next of kin before the trustee intervened, it was held that the administrator was not personally liable but that the next of kin must refund to the trustee the shares which they had respectively received (2). The reason for so deciding was that the transaction was not one for value. A settlement made on a second marriage by an undischarged bankrupt of interests acquired after his property in trust funds settled before his bankruptcy and still in the hands of settlement trustees is a transaction for value and the fact that the value given for the transaction is not such as will increase the bankrupt's estate does not matter (3). A charging order absolute obtained on shares which were after-acquired property of an undischarged bankrupt is not a transaction for value (4).

The second condition is that the person dealing with the bankrupt should have acted *bona fide* and it is to be noted that the stress of *bona fides* is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question whether the bankrupt as between himself and his creditors is also dealing in good faith is immaterial (5). The knowledge of the bankruptcy on the part of the person so dealing (6) or the fact that the trustee was not aware of the existence of the after-acquired property does not invalidate the transaction (7).

(1) *Re Clark*, (1894) 2 Q. B. 393, following *Exp. Ford*, 1 Ch. D. 521.

(2) *Re Bennet*, (1907) 1 K. B. 149; Also see *Re Ball*, (1899) 2 Irish. R. 313.

(3) *Re Behrend's Trusts*, (1911) 1 Ch. 687.

(4) *Hosack v. Robins*, (No. 2), (1918) 2 Ch. 339.

(5) *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262.

(6) *Hosack v. Robins*, (No. 2), (1918) 2 Ch. 339; *Dyster v. Randal*, (1926) 1 Ch. 932.

(7) *Hunt v. Fripp*, (1898) 1 Ch. 675.

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Summarising the history of the case-law, the following points may be noted :—

(i) A right of action in respect of after-acquired property has been given to the insolvent, irrespective of the nature of the property.

(ii) A transfer by the insolvent was, before the Act of 1913, valid only if the property was personal estate and not when it was real estate. Now such transactions are valid even in respect of immovable property.

(iii) The case of successive bankruptcies was at first an exception to the rule in *Cohen v. Mitchell* and is now governed by express legislation.

Law under the Presidency-towns Insolvency Act.—By S. 52 (2) (a), P.-t. I. A., 1909, it is provided that the property of the insolvent divisible among his creditors shall comprise all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before discharge. This provision is based on section 44 of the Bankruptcy Act, 1883; and the truth is that the Act itself, like its predecessor, the Indian Insolvency Act, 1848, is based on English bankruptcy statutes. The result has been that in interpreting the provisions of the Indian Act the judges have largely drawn upon decided English cases. The English law as to the insolvent's right of action in respect of after-acquired property has been unanimously followed by the Indian Courts (1).

The rule has also been applied to after-acquired movables, including choses in action (2).

As regards the applicability of the rule in *Cohen v. Mitchell* to immovable property there is a difference of opinion amongst the Indian High Courts. In a Madras case decided under the Indian Insolvent Act it was held, following the English cases, that the rule did not apply to immovable property (3). On the other hand it has been held by the High Courts of Bombay (4), Calcutta (5), Allahabad (6) and Rangoon (7)

(1) *Sriramulu v. Andalammal*, (1907) 30 Mad. 145; *Fatimabibi v. Fatimabibi*, (1892) 16 Bom. 452; *Dasarathy Sinha v. Mahamulya*, (1902) 47 Cal. 961; 60 I. C. 977; *Balibhadra Das v. Mirchilal*, 48 I. C. 236; A. I. R. 1917 N. 147; *Ramnath Iyer v. Nagendra Iyer*, A. I. R. 1924 Mad. 223; 76 I. C. 805 (A case under the Provincial Insolvency Act.); *Poonam Chand v. Motilal*, 158 I. C. 542; A. I. R. 1935 Bom. 378; *Choung Taik v. Ma Thien Nu*, 8 Rang. 665; 131 I. C. 504; A. I. R. 1931 Rang. 74 (2); *Premchand Mullick v. Nilmonidas*, 61 C. 281; 151 I. C. 137; A. I. R. 1934 Cal. 529; *Mani Iyer v. Syed Ebrahim*, 12 Rang. 429; 154 I. C. 79; A. I. R. 1934 Rang. 333; *Muralidoss v. Official Assignee of Madras*, 43 I. C. 532; A. I. R. 1918 Mad. 356; *Official Assignee v. N. P. A. K. Chettyar Firm*, 103 I. C. 174; 5 Rang. 229; A. I. R. 1927 Rang. 190.

(2) *Andrew Rozario v. Mahomed Ibrahimsarang*, A. I. R. 1924 Bom. 460; 83 I. C. 34; 48 Bom. 583; 26 B. L. R. 695; *Choung Taik v. Ma Thein Nu*, 131 I. C. 504; A. I. R. 1931 Rang. 74 (2); *Premchand Mullick v. Nilmonidas*, A. I. R. 1934 Cal. 529; *Poonamchand Pratapji v. Motilal Kapurchand*, A. I. R. 1935 Bom. 378; 158 I. C. 542.

(3) *Rowlandson v. Champion*, 17 Mad. 21.

(4) *Ali Mahomed v. Vedilal*, (1919) 43 Bom. 890; 53 I. C. 197.

(5) *Kristocomul v. Suresh Chunder*, (1882) 8 Cal. 556; *Prem Chand Mullick v. Nilmonidas*, A. I. R. 1934 Cal. 529; 61 Cal. 281; 151 I. C. 137.

(6) *Chhote Lal v. Kedar Nath*, 84 I. C. 289; 46 All. 565; A. I. R. 1924 All. 703.

(7) *Official Assignee v. N. P. A. K. Chettyar*, (1927) 5 Rang. 229; 103 I. C. 174; A. I. R. 1927 Rang. 190. (See also *Dastur Mahar v. Official Receiver*, 97 I. C. 980; A. I. R. 1927 Nag. 16 case under Act 2 of 1907.

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Effect of intervention of Official Assignee.—We have seen that unless the official assignee intervenes the bankrupt can validly transfer after-acquired property for value to a *bona fide* dealer. Once the official assignee has, however, intervened the property vests in the official assignee indefeasibly and he cannot afterwards divest it from himself (1). It is a question of fact as to what acts and events constitute such intervention as to vest the property in the official assignee. What is required for constituting intervention must naturally take its colour from the nature of the property. In the case of a money due to the insolvent, a demand of payment by the official assignee is sufficient intervention to support a suit or other action by the official assignee in respect of that debt (2). When the property consists of a right of action and there is already a suit pending, then the proper course appears to be that the official assignee should apply to be made a plaintiff in the suit and to be given the conduct of the suit (3).

Law relating to after-acquired property under the Provincial Insolvency Act.—Under the Provincial Insolvency Act there is a conflict of opinion as to whether after-acquired property vests in the receiver as soon as it is acquired or its vesting is postponed till the intervention of the receiver or the insolvency court. It has been held by the Madras (4), Bombay (5), Allahabad (6) Lahore (7), Oudh (8), Sind (9) and Rangoon (10) High Courts that the law under the Provincial Insolvency Act is different from that obtaining under the English law or the Presidency-towns Insolvency Act. This view is supported by the language of the section and the use of the word "forthwith" therein and by the decision of Their Lordships of the Privy Council in the case of *Kala Chand Banerjee v. Jagan Nath Marwari* (11). After having referred to the rules of English law and section 47, Bankruptcy Act,

(1) *Hill v. Settle*, (1919) 1 Ch. 319.

(2) *Macleod v. B. B. & C. I. Railway Company*, 1905, 7 B. L. R. 618; *Emden v. Carte*, 1881, 17 Ch. D. 768.

(3) *Phoonamchand Partapji v. Motilal Kapurchand*, A. I. R. 1935 Bom. 378; see also the judgment of Fry, L. J. in *Cohen v. Mitchell*, 1890, 25 Q. B. D. 262.

(4) *Matam Lingayya v. Anumala Venkatapathy*, A. I. R. 1935 Mad. 694; 157 I. C. 1002.

(5) *Girikant Shival v. Vedi Lal*, A. I. R. 1936 Bom. 161; 60 Bom. 141; 162 I. C. 253.

(6) *Abdul Rehman v. Nihal Chand*, A. I. R. 1935 All. 675 (F. B.); 157 I. C. 41.

(7) *Diwan Chand v. Manak Chand*, A. I. R. 1934 Lah. 809.

(8) *Buddhu Lal v. Ram Sahai*, 108 I. C. 898; 8 Luck. 87; A. I. R. 1932 Oudh 244.

(9) *Khemchand Mitharam v. Hemandas Ram Rakhaimal*, A. I. R. 1937 Sind 306.

(10) *Ma Phaw v. Maung Ba Thau*, 97 I. C. 221; 4 Rang. 125; A. I. R. 1926 Rang. 179.

(11) A. I. R. 1927 P. C. 108; 101 I. C. 442; 54 I. A. 190; 54 Cal. 595.

S. 28 1914, Sulaiman, C. J., who delivered the judgment of the Allahabad Full Bench, proceeded to make the following observations :—

(4). “But in India neither the Provincial Insolvency Act, 1907, nor the Act of 1920 draws any such distinctions. Section 28 (2) makes the whole of the property of the insolvent vest in the court or the receiver on the making of the order of adjudication, and sub-section (4) provides that all property which is acquired by or devolves on the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the court or the receiver and the provisions of sub-section (2) shall apply in respect thereof. It is, therefore, perfectly clear that property existing at the time of the adjudication as well as property acquired by or devolving on the insolvent after adjudication stands on the same footing and both vest forthwith in the court or the receiver, as the case may be. No distinction appears to have been drawn by the legislature in respect of these two classes of property. It would amount to legislating if any such distinction were to be imported into the section on account of certain rules of law which prevail in England. The Insolvency Act in India is not in every respect identical with the Bankruptcy Act in England, and there is accordingly no justification for deciding cases under the Indian Act, in the light of cases decided in England.”

To the same effect are the words of the learned judges of the Rangoon High Court : “It seems to us that the insertion of the word ‘forthwith’ by the legislature in section 28, sub-section (4) was to sweep away the court’s attempt to postpone the vesting. In view of the specific and clear words of the sub-section we are unable to apply the principle of *Cohen v. Mitchell* to the present case as to do so, in our opinion, would be to nullify the express direction of the legislature.”

On the words “forthwith vest” great stress was also laid by Pandrangrow, J., in A. I. R. 1935 Mad. 694 (1).

In the Privy Council case *Kala Chand Banerji v. Jagan Nath Marwari* (2), an undischarged insolvent acquired by inheritance the equity of redemption in certain properties, when a suit in respect of a mortgage of the properties was pending. The question for decision arose as to whether the official assignee in whom the property of the insolvent had vested was a necessary party to the suit. In deciding this point Lord Salvesen referred to section 16, clause 4, P. I. A., 1907, and remarked : “This provision is perfectly clear. The moment the inheritance devolved on the insolvent, Amulya, who was still undischarged, it vested in the receiver already appointed, and he alone was entitled to deal with the equity of redemption.” It was further held that a decree obtained in the suit in the absence of the official receiver was not binding on the receiver. It was not suggested in that case that the receiver had not intervened prior to the passing of the decree which was based on a compromise.

The view that the rule in *Cohen v. Mitchell* is applicable under the Provincial Insolvency Act has been taken in a Division Bench of the Madras High Court in A. I. R. 1924 Mad. 223 (3), and also by a Division

(1) *Matam Lingayya v. Anumala Venkatapathy*, A. I. R. 1935 Mad. 694 : 157 I. C. 1002.

(2) A. I. R. 1927 P. C. 103 : 101 I. C. 443 : 54 Cal. 595 : 54 I. A. 190.

(3) *K. Ramanatha Iyer v. T. S. Nagendra Iyer*, A. I. R. 1924 Mad. 223 : 76 I. C. 805.

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Bench of the Patna High Court in A. I. R. 1929 Pat. 97 (1). In the Madras case the learned judges relied upon earlier Indian decisions decided under the Indian Insolvent Act. That was a case where the dispute was as to whether an undischarged insolvent could maintain a suit for accounts and dissolution of partnership entered into after the order of adjudication. It was held that the suit was maintainable by the insolvent till the official assignee intervened. In the Patna case the Rangoon ruling cited above was referred to and dissented from on the ground that the language of the present sub-section is not stronger than that of section 7 of the Indian Insolvent Act. The Privy Council case however was not cited before the Patna judges. The Madras Division Bench ruling was not referred to in A. I. R. 1935 Mad. 69+. The point was raised but not decided in another Madras case (2).

It is submitted that the first view, holding that the rule in *Cohen v. Mitchell* does not apply under the Provincial Insolvency Act, is correct. The language of section 28, sub-section (4) is not so different from that used in S. 52, P.-t. I A., as to lead to the conclusion that the law under the two Acts is different. But the Privy Council case cited above is clear authority for the proposition that an undischarged bankrupt cannot represent his interests as regards after-acquired property in a suit so as to bind the receiver even though the receiver has taken no steps to intervene.

Receiver's rights in after-acquired property.—The leading Indian case on the point is *Kerakoose v. Brooks* (3). In that case the uncertificated insolvent borrowed money for the purpose of purchasing goods to carry on a business; and in order to secure the advances gave a bond and agreed in writing to execute a mortgage of the goods so purchased to the lender to secure their payment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of and without any objection by the official assignee. The lender had never possession of the goods assigned to him by the insolvent and the same remained in possession of the insolvent until his death. The Privy Council held that the insolvent's after-acquired property was subject to the lien of the lender and that such lien was paramount to any claim of the official assignee under the insolvency. In their judgment the Lords of the Privy Council said :—

“The Assignee's right to the subsequently acquired property is subject to two qualifications. In the first place, if the insolvent has acquired property subject to liens and obligations, then any property taken by the assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent. The second qualification is this, that if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Act, in the first instance the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency.”

(1) Jagdish Narain Singh v. Mst. Ramsakal Quer, A. I. R. 1929 Pat. 97 : 8 Pat. 478 : 114 I. C. 465.

(2) Nilakanta Subudhi v. Ramachandra Deo, A. I. R. 1932 Mad. 250 : 137 I. C. 394.

(3) (1860) 8 M. I. A. 339.

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The law as laid down in the above Privy Council case is not exhaustive (1). The above rules are merely examples of the general equitable principle of estoppel. The general rule is that if a man having a charge on property stands by and allows another to advance money on it on the supposition that it is unencumbered he ought to be postponed to the person so advancing the money (2). It applies to trustees in bankruptcy (3) and therefore an alienee of the bankrupt may acquire a good title against the trustee by virtue of the above rule. It is however essential that in order to deprive the trustee on this ground he should have had knowledge of the dealings of the bankrupt with the property and that those with whom the bankrupt dealt acted on the faith of his apparent property.

As against the insolvent himself no question of estoppel arises. The bankrupt in regard to after-acquired property is to be regarded as the agent of the official assignee (4). Acquiescence in the insolvent's possession on the part of the receiver does not disentitle him to after-acquired property. The possession of the insolvent in such a case is not adverse against the official assignee and the latter's claim to such after-acquired property, even after twelve years' possession by the insolvent, is not barred by limitation (5).

Sub-section 5.—It has already been dealt with above. See sub-section (2) first part.

Sub-section 6.—It is provided that a secured creditor is at liberty to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed. The general scheme of the Act is that the secured creditor stands outside the insolvency proceedings (6) unless he himself chooses to submit to the jurisdiction of the insolvency court. The conditions on which a secured creditor can come in insolvency to prove for his debt and claim dividends are laid down in section 47, clauses 1 to 5. Under these conditions only he can participate and have a share in the distribution of the insolvent's assets. If the secured creditor does not comply with them he is excluded from all share in any dividend. Unless the secured creditor submits himself to the jurisdiction of the insolvency court the latter has no right to interfere with the former's claim. Where the receiver issued notice to the mortgagee whose debt had been included in the schedule of liabilities filed by the debtor to prove his claim but he failed to appear, his failure to so appear and prove his debt in insolvency could not take away his rights to enforce his security (7). Nor the mere silence of the mortgagee in reply to a notice by the official receiver stating that

(1) *Rowlandson v. Champion*, 17 Mad. 21 at page 33, per Muttusami Ayyar, J.

(2) *Exp. Ford*, 1 Ch. D. 521.

(3) *Troughton v. Gitley*, (1766) Amb. 630; 27 E. R. 408; *Engelbach v. Nixon*, (1875) L. R. 10 C. P. 645.

(4) *Herbert v. Sayer*, 5 Q. B. 965, per Tindal, C. J.; *Re. Bennett*, (1907) 1 K. B. 149.

(5) *Official Assignee v. Moorli Doss*, A. I. R. 1914 Mad. 238; 22 I. C. 271, dissenting from *Kristocomal Mitter v. Suresh Chander Deb*, 1882, 8 Cal. 556.

(6) *Rajendra Chandra Sarkar v. Bipin Chandra Saha*, 60 Cal. 1298; 149 I. C. 399; A. I. R. 1934 Cal. 64; *Nrishingha Kumar Singha v. Debprasanna Mukerjee*, 62 Cal. 483; 157 I. C. 140; A. I. R. 1935 Cal. 460.

(7) *Shri Dhar v. Atuna Ram Govind*, 7 Bom. 455; *Shri Dhar v. Krishnaji*, 1888, 12 Bom. 272; *Sheorai Singh v. Gawri Sahai* (1899) 21 All 927

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he proposed to sell the property free from his mortgage can extinguish the mortgagee's rights. Such silence does not amount to relinquishment of security under section 47 nor to consent for the official receiver's proposal. Not only that, but under the Provincial Insolvency Act the insolvency court or the receiver is not authorised to sell the property of the insolvent free from incumbrances even with the consent of the incumbrancers, unless the facts amount to an authorisation of the mortgagor or receiver to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realized in the sale in discharge of his debts (1). Where therefore a creditor has not elected at any time to relinquish his security for the general body of creditors, the court cannot direct that the property be sold and that the creditor be given priority in the payment of debts (2). Under the English law and the Presidency-towns Insolvency Act the receiver can sell the property free from mortgage with the consent of the mortgagee (3).

If in any circumstances the receiver realizes the property, the debt due to the secured creditor at the date of such realisation constitutes a charge payable to the secured creditor out of the amount so realized and he has generally the same right in respect of the sale proceeds as he had in respect of the original security (4). If during the pendency of the insolvency proceedings, the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgage amount from the compensation received for the property acquired (5). On adjudication the equity of redemption only vests in the receiver (6), the value of the insolvent's right to redeem that property can only be his assets available for distribution (7). The official assignee, having executed a decree which had been assigned by the insolvent by way of security, is in the position of a mortgagor who has sold the mortgaged property and is in possession of the sale proceeds. Until the claim of the mortgagee is satisfied the insolvent or his official assignee has no right to the proceeds of the decree (8). And the purchaser from the receiver does not get a title higher than that of the mortgagor, that is to say, he gets the property subject to the mortgage and the mortgagee is entitled to enforce his rights against such purchaser (9). Where a mortgage executed prior to the insolvency of the mortgagor was satisfied after the mortgagors had become insolvent by the execution of a fresh mortgage to a third person, it was held that the latter mortgagee was entitled to possession of

(1) *Kanniappa Mudali v. Raju Chettiar*, 79 I. C. 850 : 47 Mad. 605 : A. I. R. 1924 Mad. 761.

(2) *Sant Prasad Singh v. Sheodut Singh*, A. I. R. 1924 Patna 259 : 2 Pat. 724 : 77 I. C. 589.

(3) Sch. II, r. 18, Pt. I. A. (1909).

(4) *Moti Ram v. Rodwell*, 76 I. C. 749 : A. I. R. 1923 All. 159.

(5) *Purshottam Naidu v. Ramaswamy*, A. I. R. 1925 Mad. 245.

(6) *Shridhar v. Krishnaji*, (1888) 12 Bom. 272 : A. I. R. 1914 Bom. 271 ; *Lang v. Hoputullabhai*, (1914) 38 Bom 359 : 21 I. C. 714 ; *Kaniappa v. Raju*, (1924) 47 Mad. 605 : A. I. R. 1924 Mad. 761 : 79 I. C. 850.

(7) *Govinda v. (Khansahib) Abdul Kadir*, A. I. R. 1923 Nag. 150 : 71 I. C. 558.

(8) *Lang v. Heptullabhai Ismailji*, A. I. R. 1914 Bom. 271 : 21 I. C. 714 : 38 Bom. 359.

(9) *Shridharnarayan v. Atmaram Govind*, 7 Bom. 455 ; *Shridhar Narayan v. Krishauji Vithoji*, 12 Bom. 272,

- S. 28 (6). the property under his mortgage against the auction-purchaser in insolvency proceedings (1). The reasons for the view taken in these two cases were thus stated in the Allahabad case : "If it is open and legal to a secured creditor to realise his security in any way he prefers, surely, the means that are adopted to realise the security are also valid unless forbidden by any statutory law. If it was open to Bhagwan Das (original mortgagee) to realize his mortgage by suing upon it and enforcing his decree, why should a private settlement come to between him and the mortgagors by which a fresh mortgage was given to a third party and from the proceeds of which Bhagwan Das's mortgage was satisfied be considered to be invalid under Act III of 1907 ?.....The consideration of the deed was utilized towards the payment and discharge of the mortgage of Bhagwan Das and therefore the mortgage in suit is not invalid." It is submitted that these cases are not good law because of the pronouncement of the Privy Council in *Kala Chand v. Jagan Nath* (2). After adjudication the insolvent cannot deal with his property as to give a valid title to a transferee. The first mortgage in the above cases is certainly protected but the second mortgagee does not get any title under his mortgage except that under certain circumstances he may be subrogated to the rights of the first mortgagee.

The rights of the mortgagee to the original security not only remain unaffected by the mortgagor's insolvency but also they extend to the realizations made from that property in the hands of a court receiver pending the mortgage suit in the event of the security proving insufficient, in preference to those of the receiver. Where in a suit for sale of property based on an equitable mortgage, the court appoints a receiver to collect the rents and profits of the property pending its sale and afterwards the mortgagor becomes insolvent and the Official Assignee in whom his estate vests, claims the profits in the hands of the receiver for the benefit of the general body of creditors in preference to the mortgagee, the mortgagee has a right to the *mesne* profits in the possession of the receiver being paid to him in satisfaction of his mortgage in the event of his succeeding in the suit and the sale proceeds of property being insufficient to pay off his mortgage debt, and the Official Assignee has no right to claim the rents and profits on behalf of the general body of creditors in preference to the mortgagee since his title cannot be superior to that of the insolvent (3). The reason for the decision is that the possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who obtained the appointment and on this principle a receiver who is appointed at the instance of the mortgagee holds the properties for his benefit alone and is bound to make over the entire income to the satisfaction of his dues (4). And the same principle will apply, even though the mortgagor's rights in the premises have passed to his assignee in

(1) *Ratanlal v. Govinda*, 90 I. C. 349 : A. I. R. 1926 Nag. 29 ; *Shyam Sarup v. Nandram*, 1921, 43 All. 555 : 63 I. C. 366 : A. I. R. 1921 All. 232.

(2) A. I. R. 1927 P. C. 108 : 101 I. C. 442 : 54 I. A. 190 : 54 Cal. 595.

(3) *Moolji Morarji, in re*, 115 I. C. 306 : 23 S. L. R. 200 : A. I. R. 1929 Sind 114 ; *Official Assignee v. Punjab National Bank, Ltd.*, 26 S. L. R. 61 : I. R. 1932 Sind 79 : 137 I. C. 338 : A. I. R. 1932 Sind 82 ; *Venkata Kumara Mohipathi Surya Rao Bahadur Garu v. Gokuldass Goverdhandass*, A. I. R. 1931 Mad. 626.

(4) *Rameswar Singh Bahadur v. Chuni Lal Shah*, A. I. R. 1920 Cal. 545 (The contest was between two mortgagees).

bankruptcy and have been sold by him (1). Furthermore, the insolvency court has no power under the law to remove a receiver so appointed from the possession or custody of property under S. 56, P. I. A., 1920, as the receiver is a person whom the judgment-debtor had not a present right to remove (2).

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To realize or otherwise deal with the security.—Under the general law a secured creditor has either the authority to realize the security by private sale or he can enforce his security by way of suit. Thus a pawnee has authority to sell the property without the intervention of the court if the pawnor, after a proper notice is given to him to repay the money, fails to do so. And the same is true of a mortgagee who is in fact in possession of the mortgaged movable property without any objection from the mortgagors (3). In regard to immovable property the English law as well as the Indian law gives a private right of sale in certain cases. In some cases it was contended that the words “realize or deal with the security” have reference to the powers of mortgagees or pledgees to sell the property mortgaged or hypothecated to them without recourse to a suit and that cases of enforcing security by way of suit are not covered. This contention was accepted in a Single Bench ruling of the Bombay High Court (4), but it was not accepted in a subsequent Bombay Division Bench case (5). It was also accepted in a Rangoon case (6) which was subsequently dissented from. In a recent Madras case it was held that section 28, clause 6, which is applicable only to the *mofussal*, cannot be said to refer to the right of a mortgagee to effect private sale of the property only and the word “realize” must be understood in the ordinary sense of a secured creditor realizing his security by way of suit (7). Thus a secured creditor has a right to institute a suit or to proceed with the suit commenced before the order of adjudication (8). Nor is he barred from executing a mortgage-decree passed in his favour before or after the order of adjudication. Where by an order passed under O. 20, r. 11 (2), C. P. C., the judgment-debtor was to execute a mortgage to the decree-holder, it was held, having regard to the facts of the case, that the subsequent adjudication of the judgment-debtor as an insolvent could not affect the rights of the decree-holder to have the mortgage executed in his favour (9). The same will hold good where a person becomes a secured creditor by the terms of the decree in his favour in a money suit (10).

(1) High on “Receivers,” para 643, quoted in A. I. R. 1931 Mad. 626.

(2) *Nrishinha Kumar Sinha v. Deb Prosanna Mukerji*, A. I. R. 1935 Cal. 460 : 62 Cal. 483 : 157 I. C. 140.

(3) *Ahmed Alimahomed Khoja, in re*, A. I. R. 1932 Bom. 613 : 142 I. C. 56.

(4) *Lal Chand v. Balkrishan*, (1913) 21 I. C. 689.

(5) *B. N. Lang v. Heputullabhai Ismailjee*, A. I. R. 1914 Bom. 271 : 38 Bom. 359 : 21 I. C. 714.

(6) *In the matter of L. W. Nasse*, A. I. R. 1929 Rang. 229 : 118 I. C. 615 : 7 Rang. 201.

(7) *Official Receiver of Coimbatore v. Palaniswami Chetti*, 88 I. C. 934 : 48 Mad. 750 : A. I. R. 1925 Mad. 1031.

(8) A. I. R. 1925 Mad. 1051 *supra*.

(9) *Allan Bros & Co. v. Shaik Jooman & Sons*, 85 I. C. 291 : 4 Bur. L. J. 32 : 2 Rang. 673 : A. I. R. 1925 Rang. 189.

(10) *Bapujee v. Tausa*, 120 I. C. 218 : A. I. R. 1930 Nag. 17.

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Insolvency court's power to inquire into validity of mortgage, and to stay sale pending such enquiry.—The sub-section does not bar the insolvency court from enquiring into the validity of the mortgage-debt. Under section 4 the court has very wide powers. For procedure which the court should follow in such a case see the undermentioned case (1). Ordinarily the court has no jurisdiction to restrain a mortgagee from proceeding with a suit to enforce his mortgage (2), or prevent him from selling the property (3), but where the validity of the mortgage is called in question the court may in a proper case stay the sale of the property by injunction. For full notes see commentary under section 5.

Who is a secured creditor.—The term "secured creditor" has been defined in section 2 (1) (e) as meaning a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor. A judgment-creditor who has obtained an order for the appointment of a receiver is not thereby made a secured creditor (4). Such an order does not give the person who has obtained it a lien upon the property of the judgment-debtor, but places it in custody of the receiver to be held by him as agent for the court, and not for the creditor. A person is not entitled to the benefit of an order to enforce which a writ of sequestration has been issued and served (5), even where money has been recovered by virtue of the process but paid under order of the court into a sequestration account and not to the credit of the action in which the sequestration order was issued (6). Similarly it has been held in India that a creditor who has obtained an attachment of the debtor's property in execution has no lien or charge upon the debtor's property and is not entitled to rank as a secured creditor (7). Where, in an action on a bill of exchange, money was deposited in court by the defendant to abide the event, and the matter was submitted to arbitration, and before the award the defendant became bankrupt, it was held that the plaintiff was a creditor holding security (8). So also if a defendant pays money into court with a denial of liability and becomes bankrupt before the hearing, the plaintiff is a secured creditor for so much of his claim in the action as may be admitted for proof in bankruptcy (9). The same principle applies to money paid into court as a condition of leave to defend under O. 37, r. 3, C. P. C., and such money will be ordered to remain in the court until the event is determined either by trial of the action or admission of the proof (10).

(1) *Tyeb Ali Mullick v. Purna Chand Pal*, 1926, 43 Cal. L. J. 219; 93 I. C. 898; A. I. R. 1926 Cal. 618; 30 C. W. N. 898 (case under the Presidency-towns Insolvency Act).

(2) *Exp. Hirst*, (1879) 11 Ch. D. 278.

(3) *Re Evelyn*, *Exp. General Public Works and Assets Co., Ltd.*, (1894) 2 Q. B. 302.

(4) *Re Dickinson*, 22 Q. B. D. 187; *Re Tillet*, 9 Mor. 70; *Re Potts*, 1893, 1 Q. B. 648; *Re Anglesey*, 1903, 2 Ch. 727; *Re Pearce*, (1919) 1 K. B. 354.

(5) *Exp. Nelson*, 14 Ch. D. 41; *Re Hastings*, 9 Mor. 234.

(6) *Re Pollard*, (1903) 2 K. B. 41.

(7) *Gopi Nath v. Gur Prasad*, 15 I. C. 830; *Kamla Bala Dasi v. Surindra Nath Ganguli*, A. I. R. 1937 Cal. 517.

(8) *Exp. Banner*, *Re Keyworth*, L. R. 9 Ch. 379.

(9) *Re Gordon*, 4 mans. 141.

(10) *Re Ford*, (1900) 2 Q. B. 211.

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(6)

Where a bankrupt had accepted a bill conditionally on certain bills of lading being given up to him, the holder of the bill, who also held the bills of lading, was held to be a creditor holding security on the property of the bankrupt (1). A landlord is not a secured creditor in respect of arrears of rent, though he may have a right to distrain (2). The holder of a rent decree in respect of land in Oudh is a secured creditor (3). The debts of a deceased Mahomaden do not form any charge on the property inherited by the heirs and they can be proved in the heirs' insolvency as unsecured debts (4). The view that it is only after a creditor has proved in insolvency that he is a secured creditor and the provisions of section 28 (6) apply, is erroneous. A secured creditor owes his position to his security obtained prior to the debtor's insolvency, and not necessarily to any proof in insolvency for his debt (5). Where by the terms of the decree a party to a money suit is a secured creditor, it is not necessary for him to prove in insolvency (6). In the last case a compromise decree had been passed in a money suit and a charge was created on the house of the defendant. It was held that so far as the enforcement of the charge in execution proceedings was concerned, the subsequent insolvency of the judgment-debtor was not a bar.

For other cases see commentary under sub-section (2).

Secured creditor and leave to sue.—Sub-section (2) is controlled by section 28, sub-section (6). It is, therefore, not necessary for a secured creditor to obtain the leave of the insolvency court under the former sub-section for bringing a suit on the basis of his mortgage (7). The ruling in *In the matter of L. W. Nasse* (2), which took a contrary view, was dissented from in A. I. R. 1935 Rang. 92, a Division Bench decision, and must be deemed to have been overruled.

Sub-section (6) controls sub-section (3).—It has been held that the reputed ownership clause, *i.e.*, sub-section (3) does not apply to secured creditors (9). For this view reliance has been placed upon the position

(1) *Exp. Brett*, L. R. 6 Ch. 838.

(2) *Raghubir Singh v. Ram Chandar*, 8 A. L. J. 1287 : 12 Ind. Cas. 927 : 34 A. 121.

(3) *Siri Ram Kaur v. Ram Prasad Ghosh*, 113 I. C. 86 : 5 O. W. N. 1134 : 4 Luck. 241 : A. I. R. 1929 Oudh 71.

(4) *Nainer Rowthen v. Kuppi Pichai Rowthen*, A. I. R. 1929 Mad. 600 : 120 I. C. 889.

(5) *Kashi Bai v. Chunnilal Hathising*, 122 I. C. 857 : 31 Bom. L. R. 1199 : A. I. R. 1930 Bom. 11.

(6) *Bapujee v. Tausa*, 120 I. C. 218 : A. I. R. 1930 Nag. 17.

(7) *Lang v. Heputullabhai*, 1914, 38 Bom. 359 : 21 I. C. 714 : A. I. R. 1914 Bom. 271, dissenting from an earlier decision of the same court in *Lal Chand v. Bal Krishan*, (1913) 21 I. C. 689 ; *Badri Das v. The Chetty Firm of O. A. M. K.*, 45 I. C. 918 : A. I. R. 1918 L. B. 52 ; *Kashi Bai v. Chunni Lal Hathi Sing*, 112 I. C. 857 : 31 Bom. L. R. 1199 : A. I. R. 1930 Bom. 11 ; *Official Receiver, Coimbatore v. Palani Swami Chetti*, A. I. R. 1925 Mad. 1051 : 88 I. C. 934 : 48 Mad. 750 ; *Sant Parsad Singh v. Sheodut Singh*, A. I. R. 1924 Patna 259 : 77 I. C. 589 : 2 Patna 724 ; *Rajendra Chandra Sarkar v. Bipinchandra Saha Bhaumik*, A. I. R. 1934 Cal. 64 : 149 I. C. 399 : 60 Cal. 1298 ; *M. K. M. Chettyar Firm v. Maung Thaung*, A. I. R. 1935 Rangoon 92 : 13 Rang. 37 : 155 I. C. 227.

(8) *In the matter of L. W. Nasse*, A. I. R. 1929 Rang. 229 : 118 I. C. 615 : 7 Rang. 201.

(9) *Shamaldas Kschetry v. Phanindra Nath Roy Chowdhry*, 72 I. C. 467 : A. I. R. 1923 Cal. 532 ; *Moti Ram v. Rodwell*, 76 I. C. 749 : A. I. R. 1923 All. 159.

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of the two sub-sections. In this respect the law under the Provincial Insolvency Act has (it appears that it was by accident) become different from that obtaining under the English Bankruptcy Act and the Presidency-towns Insolvency Act (1).

Receiver is a necessary party to a mortgage suit.—It was so decided by Their Lordships of the Privy Council in *Kala Chand Banerjee v. Jagan Nath Marwari* (2). In interpreting sub-section (5), S. 16, P. I. A., 1907, corresponding to the sub-section under consideration, Lord Salvesen made the following observations :—

“Clause 5 does not mean that the secured creditor is entitled to deal with the security as though there had been no vesting in the court or the receiver. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course, plain ; but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he, and not the insolvent, has the sole interest in respect of the property. A compromise in a mortgage suit between mortgagee and insolvent mortgagor is therefore a nullity.”

The Privy Council case has been followed in subsequent cases by the Indian High Courts (3). The ruling in *Khazanchi Shah v. Nizam Din* (4), which held that the official receiver is not a necessary party in a mortgage suit is, it is submitted, not good law. The learned judges followed A. I. R. 1925 Cal. 785 (5), a ruling which had been already reversed by the Privy Council in A. I. R. 1927 P. C. 108 which was not cited at the bar. The above ruling was not followed by the same High Court in a subsequent decision (6). If the official receiver is not made a party, he will not be bound by any decree that may be passed in the suit (7), or by the sale of the mortgaged property in execution of any such decree (8), even if before the decree was passed he had applied to be joined as a party and his application had been refused. He may sue to set aside the decree as well as the sale (9).

When the mortgagor is adjudicated insolvent pending the suit to enforce the mortgage and an application to implead the official receiver is made, it is not governed by section 22 (2), Limitation Act but by O. 22, r. 10, C. P. C. His impleading is not equivalent to adding a new party within the meaning of section 22, Limitation Act (10).

(1) *Dhanrajmal Kishindas v. Official Assignee*, 131 I. C. 130 : A. I. R. 1931 Sind 44.

(2) A. I. R. 1927 P. C. 108 : 54 Cal. 595 : 54 I. A. 190 : 101 I. C. 442.

(3) *Nainar Rowthen v. Kappai Pichai Rowthen*, 120 I. C. 889 : A. I. R. 1929 Mad. 609 ; *Rajendra Chandra Sarkar v. Bipinchandra Sahu Bhaumik*, 60 Cal. 1298 : 149 I. C. 399 ; *Karim Bukish v. Khesa*, A. I. R. 1935 Lah. 316 ; *Punjab National Bank v. Mst. Chand Kaur*, A. I. R. 1937 Lah. 402.

(4) 126 I. C. 174 : A. I. R. 1930 Lah. 791.

(5) *Jagannath v. Kalachand Banerjee*, A. I. R. 1925 Cal. 785 : 86 I. C. 1012.

(6) *Karim Buksh v. Khesa supra*.

(7) *Mokhshagunam Subramania Aiyar v. Ramakrishna Aiyar*, A. I. R. 1922 Mad. 335 : 70 I. C. 357 ; *Punjab National Bank v. Mst. Chand Kaur*, A. I. R. 1937 Lah. 402.

(8) *Nainar Rowthen v. Kappai Pichai Rowthen supra*.

(9) *Kala Chand v. Jagan Nath supra*.

(10) *Karim Buksh v. Khesa*, A. I. R. 1935 Lah. 316.

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(7).

Sub-section (7) ; relation back.—In sub-section (7) we have what is called in English law “Doctrine of relation back.” It means that the title of the receiver relates back to the date of the presentation of the petition. This is a legal fiction, but it is a very useful fiction. It is not uncommon for debtors on the eve of insolvency to transfer their property to others to defraud their creditors. Justice to the creditors requires that such transfers should not be allowed to stand, and it is for this purpose that the title of the official assignee or receiver is made to relate back to a date earlier than the date of the order of adjudication. Under the Presidency-towns Insolvency Act that date is the date when the first available act of insolvency is committed. Under the Provincial Insolvency Act that date is the date of the presentation of the petition.

History of the doctrine under English law.—The doctrine found judicial recognition by its first introduction in 13 Eliz. c., under which the trader was deprived of all power of charging or disposing of his property to the prejudice of his creditors from the moment of committing an act of bankruptcy, however long anterior to the date of the petitioning creditor’s debt this might have occurred. Section 11 of the Act of 1869 made the relation back to the completion of the act of bankruptcy on which the adjudication was based, or to the first act of bankruptcy proved to have been committed within twelve months before the adjudication, if at the time of committing such act, the bankrupt was indebted to a creditor or creditors in a sum or sums sufficient to support a petition, and if such debt or debts remained due to the date of adjudication. Under the Act of 1883, the maximum period of relation back was, as it is now under the Bankruptcy Act, 1914, three months, so that if the requisite bankruptcy proceedings are not taken within that period, the act of bankruptcy ceases to be effective and there can be no relation back to the date of that act of bankruptcy even though bankruptcy might subsequently supervene. Under the Provincial Insolvency Act the period of relation back has been still further reduced by making the date of the petition, and not the date of the act of bankruptcy, as the point to which the order of adjudication relates back.

Effect of relation back.—The effect of relation back is that all transactions and dealings with the insolvent’s property by the insolvent between the date of the petition and the date of adjudication are invalidated against the receiver, and the latter is not bound by them. This general result of the doctrine is, however, made expressly subject to an exception, it being section 55 of the Act. Under section 55 certain payments, transfers, contracts and dealings are saved and protected so as to make them binding on the official receiver. For those cases refer to section 55 *post*. One result of the doctrine is that payments made, pending the insolvency proceedings, by a debtor of the insolvent to the insolvent do not discharge him from the debt, and he is liable to repay the debt to the receiver (1). Similarly if the insolvent has made any payment to a third person, that third person is liable to repay the amount so received to the receiver (2). This does not apply to payments

(1) *Dharamdass Thawerdas v. Hukamchand Mirimul*, A. I. R. 1932 Sind 62 : 138 I. C. 628; *Jankidass v. Official Receiver, Coimbatore*, 78 I. C. 16 : A. I. R. 1925 Mad. 328.

(2) *Ex parte Edwards*, (1884) 13 Q. B. D. 747; *Re Simonson*, (1894) 1 Q. B. 433. See also *Ex parte Helder*, (1883) 24 Ch. D. 339.

S. 28 by persons who act merely as messengers to pay over the money (1).
(7). It has been held that a banker who, having moneys of the customer in his hands, honoured the customer's cheques after notice of an available act of bankruptcy committed by the customer, was liable to pay to the trustee in bankruptcy of the customer the amount so paid (2). And it has also been held that a secured creditor with notice of an available act of bankruptcy by the debtor could not receive payment of his debt and hand over the securities to the debtor (3). Similarly transfers of property by the insolvent or charges created on his property by decree or otherwise during the period of relation back do not bind the receiver (4). For the same reason property acquired or devolving upon the insolvent after the date of the petition and before adjudication belongs to the receiver (5).

The rigour of the rule can be best illustrated by the facts of an English case (6). There the debtor consulted a solicitor to whom he was indebted for costs, and on the solicitor declining to act unless he was furnished with money for future costs, the debtor handed him a sum of £ 15 for that purpose. The solicitor prepared a deed of assignment for the benefit of the creditors, which was executed by the debtor who was afterwards adjudicated on the act of bankruptcy committed by such execution, and did work prior to its execution of the value of about £ 31. It was held that the solicitor was bound to hand over the balance to the trustee, and could not apply it to costs incurred for work done for the bankrupt after the completion of the act of bankruptcy. Lord Esher, M. R., said: "The deed of assignment which has been prepared by the solicitor was executed by the debtor; its execution was an act of bankruptcy, and the solicitor knew that it was. The title of the trustee related back to that act of bankruptcy. What does that mean? The result of the relation back is that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed. Then, he being a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in bankruptcy for the purpose of being distributed by him amongst the bankrupt's creditors. Part of that work for which the £ 15 had been given to the solicitor in order that he might pay himself out of it, had not then been done. At that very moment the solicitor could not do any work for the bankrupt so as to take away from the trustee the money which was then due to the bankrupt, for the act of bankruptcy put an end to the solicitor's authority to do work for the bankrupt against the money which he then had in hand.

Scope.—The wording of the sub-section seems to suggest that, for all purposes, an order of adjudication shall relate back to and take effect from the date of the presentation of the petition. It is to be noted that until an order of adjudication is made there is no insolvency and no

(1) *Cole v. F. Wright*, (1811) 4 Taunt. 198 : 128 E. R. 305.

(2) *Vernon v. Hankey*, 2 T. R. 113.

(3) *Ponsford, Baker and Company v. Union of London and Smith's Bank, Ltd.*, 1906, 2 Ch. 444.

(4) *Tulsi Ram v. Mahamad Aziz*, A. I. R. 1928 Lah. 738.

(5) *Girikant Shivlal v. Vedilal Vrijlal*, A. I. R. 1936 Bom. 164 : 60 Bom. 141 : 162 I. C. 253.

(6) *Re Pollitt*, 1894, 1 Q. B. 455.

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(7).

question of applying the doctrine of relation back arises. Again, the vesting of the property takes place only on the making of an order of adjudication. It does not mean that the insolvent was not in fact the owner of the property during the period of relation but only that he is regarded as not having been the owner. From this it follows that the date of adjudication shall not be the same as the date of the petition except for the limited purpose of vesting the insolvent's property in the receiver. Accordingly it has been held that the date of adjudication as mentioned in section 78 (2) cannot mean, by applying the doctrine of relation back, the date of the petition (1). Nor shall the doctrine apply to the filing of a suit prior to the order of adjudication. Where, therefore, after the institution of the suit the defendant is adjudicated insolvent and the receiver is brought on record; he is brought not because he is an essential party to the suit in the sense that his absence is fatal to the suit and if he is impleaded at a later date the suit will be regarded as filed on that date for the purposes of section 22, Indian Limitation Act, but because of the provisions of section 29 of the Insolvency Act. The Madras High Court has held that sub-section (7) governs section 28 (2), and that a decree obtained in a suit filed after the presentation of the petition but before adjudication without the leave of the court is void against the receiver (2). It is submitted that this case was wrongly decided. Under the old Act it was held that section 51 was controlled by sub-section (7) of section 28 (3). In all those cases assets had been realised between the date of the petition and the order of adjudication. The material date in section 34 P. I. A., 1907, corresponding to the present section 51, was the date of adjudication; and in the above cases the doctrine of relation back was held inapplicable to the old section 34. In the present Act the date of the admission of the petition has been substituted as the material date for the date of order of adjudication. Under the present Act there is a conflict of decisions as to whether sub-section (7) governs section 34 of the Act. For detailed commentary see section 34.

Section 53 and section 28, sub-section (7).—Prior to the amendment of section 53 by Act 10 of 1930, there was a conflict of opinion amongst the different High Courts as to whether a transfer within two years of the date of the petition but more than two years from the date of the order of adjudication could be set aside under section 53 of the Act by the insolvency court. The determination of the question depended upon the further question as to whether the present sub-section governed S. 53 or not. It was held by the Bombay (4), Lahore (5), Sind (6), and

(1) *Bans (opal v. Mewa Ram*, A. I. R. 1930 All 461 : 127 I. C. 424.

(2) *Atchuta Rumayya (Guru v. Official Receiver, East Godavari*, 58 Mad. 1032 : 158 I. C. 460 : A. I. R. 1935 Mad. 817.

(3) *Sri Chand v. Murari Lal*, 34 All. 628; *Din Dyal v. Guru Saran Lal*, 59 I. C. 67 : 42 All. 336 : 18 All. L. J. 287 : A. I. R. 1920 All. 253 (2); *Madhu Sardar v. Khatish Chandra Banerjee*, 42 Cal. 289 : 30 I. C. 82 : A. I. R. 1915 Cal. 734; *Pali Ram v. Sheonath Prasad*, 2 P. L. J. 235 : 30 I. C. 246 : A. I. R. 1917 Pat. 678.

(4) *Nagindas Dayabhai v. Gordhandas Dayabhai*, 49 Bom. 730 : 27 Bom. L. R. 937 : 88 I. C. 941 : A. I. R. 1925 Bom. 480.

(5) *Ghulam Muhammad v. Panna Ram*, 72 I. C. 433 : A. I. R. 1924 Lah. 437; *Hem Raj v. Kishan Lal*, 111 I. C. 8 : 10 Lah. 106 : 29 P. L. R. 446 : A. I. R. 1928 Lah. 361 (F. B.).

(6) *Official Receiver v. Tirathdas-Mowaram*, 97 I. C. 321 : A. I. R. 1927 Sind 66; *Atmaram-Udhaydas v. Dayaram Sawney*, 115 I. C. 330 : A. I. R. 1929 Sind 94.

- 29 Rangoon (1) High Courts that the sub-section could not be imported into section 53 as to extend the period of limitation prescribed therein. This view was taken because of the difference in language used by the legislature in sections 53 and 54. The contrary view was taken by the Madras (2), Calcutta (3), Allahabad (4), Oudh (5) and Nagpore (6) Courts. The contrary view was taken, following English Law, as well as on equitable considerations and the general policy of the bankruptcy laws.

The above conflict has been now set at rest by the amendment of section 53, made by the Act 10 of 1930, which added the words "on a petition presented" in that section. For the effect of the amendment on pending cases, see commentary under section 53.

29. Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.

History.—This section is new. In the old Acts section 16 (2) (now section 28 (2)), provided that no creditor can commence any suit or other legal proceedings against the insolvent after adjudication without the leave of the court. But there was no provision for dealing with cases which may be found pending against the debtor when an order of adjudication is made against him. This has been done now by adding this section on the lines of section 18 (3), Presidency-towns Insolvency Act, 1909, (7).

Analogous Law—Section 18 (3) of the Presidency-towns Insolvency Act is in exactly similar terms. The Bankruptcy Act, 1914, as amended by Bankruptcy (Amendment) Act, 1926, contains in its section 9 (1) the following provision.

"The court may, at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor and any court in which proceedings are pending against a debtor may, on proof that a

(1) *Maung Pe v. Maung Po Htein*, 110 I. C. 361 : 6 Rang. 193 : A. I. R. 1928 Rang. 141.

(2) *Mahomed Maraikkar v. Official Receiver, Tinnevely*, 1917 M. W. N. 103 : 5 L. W. 193 : 36 I. C. 828 : A. I. R. 1917 M. 144 : *Sankaranarayana Aiyar v. Alagiri Aiyar*, 49 I. C. 283 : A. I. R. 1919 Mad. 473 : *Venkatanarasayya v. Official Receiver, Godawari*, 104 I. C. 177 : A. I. R. 1927 Mad. 826 (2) : *Rangiah v. Appaji Rao*, 99 I. C. 241 : 50 Mad. 300 : A. I. R. 1927 Mad. 163 : S. P. K. M. *Muruga Konar & Co. v. Official Receiver, Madura*, 125 I. C. 483 : A. I. R. 1930 Mad. 782 (So assumed).

(3) *Rakhal Chandra v. Sudhindra Nath Bose*, 46 Cal. 991 : 52 I. C. 747 : A. I. R. 1920 Cal. 557.

(4) *Sheonath Singh v. Munshi Ram*, 42 All. 433 : 55 I. C. 941 : A. I. R. 1920 All. 153.

(5) *Jokhan Singh v. Deputy Commissioner, Fyzabad*, 23 I. C. 924 : A. I. R. 1914 Oudh 246.

(6) *Bhagwant v. Munim Khan*, 6 N. L. R. 146.

(7) Select Committee Report, 24th September, 1919.

bankruptcy petition has been presented by or against a debtor, either stay the proceedings or allow them to continue on such terms as it may think just." **S. 29**

Scope.—Section 28 (2) provides for proceedings commenced after the order of adjudication. Section 29 provides for cases which were commenced before the order of adjudication but are pending at the time it is passed (1). By section 16 (2) [now section 28 (2)] an order of adjudication operates not as an absolute stay of all proceedings against the insolvent but as a direction that before a suit is brought a condition precedent should be complied with, *vis.*, leave of the court should be obtained (2). The filing of a suit prior to the adjudication but after the date of the presentation of the petition must be regarded as outside the purpose of the Provincial Insolvency Act with reference to section 28 (2) of the Act and the bringing in of the official receiver as a party to the suit is merely a matter of compliance with such orders as the court may pass under section 29 of the Act (3). If during the pendency of a suit a party is adjudicated insolvent, he is not disqualified by reason of his insolvency from appealing and if his adjudication is annulled during the pendency of the appeal, he is entitled to continue the appeal (4).

Does section 29 apply to suits or proceedings commenced after the order of adjudication?—All that the section requires for its applicability is that the suit or proceeding should be pending¹ at the time when the powers of the court under section 29 are sought to be exercised by an application or otherwise. It does not state as to when those pending proceedings were commenced. If we, therefore, confine ourselves to the plain wording of the section, there is no justification for importing another condition in the application of the section by confining it only to proceedings commenced before the order of adjudication.

The difficulty, however, comes in when this interpretation brings the section into conflict with section 28 (2). In cases where section 28 (2) has no application, *i. e.*, where they can be commenced without obtaining the leave of the insolvency court, this section can be easily applied. However, in those cases where the leave of the insolvency court is necessary before the suit or proceeding can be commenced, the applicability of this section has been the subject of judicial conflict. In 8 Lahore 593 (5), the view has been taken that this section does not apply to such cases. In that case a suit was instituted some three years subsequent to the debtor having been adjudicated an insolvent. It was alleged that the suit was brought in ignorance of the fact of the order of adjudication and no leave of the court to institute the suit had, therefore, been obtained. It was held that the suit had been rightly dismissed under section 28 and that section 29 was not applicable.

(1) Official Receiver, Coimbatore v. Palanisami, 48 Mad. 750 : 88 I. C. 934 : A. I. R. 1925 Mad. 1051.

(2) Ramaswami Pillay v. Govindaswami Naicker, 25 M. L. T. 247.

(3) Kaliperumal Naicker v. Ramchandra Aiyer, 53 M. L. T. 142.

(4) Ramchandra Genuji v. Shripati Sukaji, 118 I. C. 252 : A. I. R. 1929 Bom. 202.

(5) Panna Lall v. Hira Nand, 8 Lah. 593 : 102 I. C. 37 : A. I. R. 1928 Lah. 28.

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The Nagpur and Madras High Courts have, however, taken the contrary view (1). In the Madras case it was remarked that the proper remedy of a person who has instituted a suit against the insolvent without obtaining the leave of the insolvency court is to apply under section 29 of the Act to the court in which he has instituted the suit for leave to continue the suit against the insolvent.

The practical importance of this legal question however depends on an answer to a further question as to whether the court should always dismiss a suit, which has been instituted without the leave of the insolvency court. Different High Courts have given different answers. For fuller treatment refer to commentary under section 28 (2).

Insolvency Court's power of stay.—Section 18 (1) of the Presidency-towns Insolvency Act runs as follows :—

“The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court.”

S. 18 A, P.-t. I. A., runs as follows :—

“The Court may at any time after the presentation of an insolvency petition, stay any insolvency proceedings, pending against the debtor in any Court subject to the superintendence of the Court, and may, at any time after the making of an order of adjudication, annul an adjudication against the debtor made by any such Court.”

The first part of section 9 (1) of the English Act is : “The court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor.”

There are no such provisions in the Act. The provincial insolvency courts have no jurisdiction to stay proceedings pending in other courts. It can, however, stay its own proceedings (*vide* section 36 of the Act). It can only issue an injunction if the circumstances enumerated in O. 39, r. 1, C. P. C., are proved to exist. Under O. 39, r. 1, C. P. C., a court has no jurisdiction to issue an injunction to a person who is not a party to the proceedings (2).

Civil Court's power to stay.—Under section 28 vesting only takes place upon adjudication and it is not till then that a court, in which proceedings are pending against the debtor, is bound to stay proceedings against the insolvent (3). Section 29 gives power to the court before which a suit or proceeding is pending against a debtor to stay it on proof that an order of adjudication has been passed (4). The presumption from the use of the word “stay” is that the suit stayed is not at an end but may be continued afterwards. The court may stay a suit for a time till the order of adjudication is annulled and then may proceed with the hearing of the

(1) *Haji Umar v. Jwala Purshad*, 79 I. C. 662 : A. I. R. 1924 Nag. 300 ; *Cuddappah v. Balasubba Rowther*, 105 I. C. 109 : 51 Mad. 833 : A. I. R. 1927 Mad. 925.

(2) *Ramsunder Rai v. Ram Dhian*, 46 I. C. 424 : 3 P. L. J. 456.

(3) *Subramma Aiyar v. Official Receiver, Tanjore*, 93 I. C. 877 : A. I. R. 1926 Mad. 432.

(4) *Official Receiver, Coimbatore v. Palaviswami Chetty*, 48 Mad. 750 : 49 M. L. J. 203 : 1925 M. W. N. 672 : 83 I. C. 934 : A. I. R. 1925 Mad. 1051.

suit (1). The proper course in cases, where a civil suit is pending on a mortgage and when the official receiver applies to the insolvency court for a declaration that the mortgage is bad under section 53, would be to have the proceedings in the suit stayed till the disposal of the application by the insolvency court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under section 53. But there is no warrant either in law or in practice for the contention that the presentation of an application to the insolvency court for an order under section 53 takes away the jurisdiction of the civil court to proceed with the suit of a secured creditor (2). **S. 29.**

Power to stay discretionary.—Under section 29 the court shall either stay the proceeding or allow it to continue on such terms as the court may impose. This discretion is to be exercised on judicial principles. One such principle is that the court should not stay proceedings which are likely to remain unaffected by the insolvency proceedings. Thus proceedings in respect of debts not provable in bankruptcy need not be stayed. A claim for maintenance is not a debt and a suit for it and also for having the maintenance charged on the debtor's properties may, even after the adjudication of the debt as an insolvent, be continued and decided (3). An obligation to make payment of alimony may be made and enforced in spite of the receiving order (4). The fact that a husband who is in arrears of maintenance has been adjudicated an insolvent under S. 27, P. I. A., is conclusive, so long as the order of adjudication stands, that he is unable to pay the amount due. And he is not, therefore, guilty of wilful neglect within S. 488 (3), Cr. P. C. (5). An insolvent is entitled to sue for defamatory words whether published before or after his adjudication and such damages as he may receive will not belong to his creditors. This he may do so even if a part of the claim refers to an injury to the insolvent's estate; the insolvent may carry on the suit as the right of action for the injury to his character and reputation remains vested in him (6).

Again, proceedings of a preventive character will not be restrained. Imprisonment for non-payment of rates is a punitive process and an insolvency court has no power to discharge a person so imprisoned (7).

Sale in execution after adjudication of the judgment-debtor.—

An insolvent ceases to have any interest in his property as soon as a vesting order is made, and an auction-purchaser in an execution sale of the insolvent's interest in certain properties acquires no interest in them (8). If a sale is held, it should be set aside under O. 21, r. 92, C. P. C., on

(1) *Motumal Kishendas v. Ghanshamdass Parma Nand*, 120 I. C. 84 : A. I. R. 1929 Sind 204; *Marotidas v. Govind*, 120 I. C. 735 : A. I. R. 1929 Nag. 356.

(2) *Official Receiver, Coimbatore v. Palaniswami Chetty*, 48 Mad. 750 : 88 I. C. 934 : A. I. R. 1925 Mad. 1051.

(3) *Official Receiver of Cuddapah v. Kalawa Subbamma*, 99 I. C. 564 : A. I. R. 1927 Mad. 403.

(4) *Linton v. Linton*, (1885) 15 Q. B. D. 239.

(5) *Halfhide v. Halfhide*, 50 Cal. 867 : 81 I. C. 912 : A. I. R. 1924 Cal. 230.

(6) *Chainrai Waliram v. Sunday Times, Ltd.*, A. I. R. 1932 Sind 33 : 140 I. C. 233.

(7) *Edgcombe, Re*, (1902) 2 K. B. 403.

(8) *Sundarappa Aiyar v. Ram Hari*, A. I. R. 1933 Nag. 28 : 140 I. C. 835.

- S. 29.** the ground that the judgment-debtor had no saleable interest at the date of the sale (1). Where a judgment-debtor is adjudicated an insolvent before the sale of property attached in execution of a decree against him, the attaching court is bound to adjourn the sale and direct the property to be delivered to the receiver. It is not at liberty to allow the sale to proceed and to pay the sale proceeds to the receiver (2).

Procedure in suits or proceedings on adjudication.—The Act does not lay down any rules or directions as to how the court is to deal with a suit or proceeding on the adjudication of a party as an insolvent. For that one should look to the Civil Procedure Code (3). All that the party needs do is to make an application under section 29 and the court in its discretion may either stay or allow the proceedings to continue on such terms as it may think proper to impose.

Order 22, rule 8, C. P. C., lays down the procedure to be followed when a plaintiff becomes insolvent. It runs as follows :—

“(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the court otherwise directs) to give security for the costs thereof within such time as the court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.”

Rule 11 makes this procedure applicable to appeals.

The proper procedure for the court on being informed of the plaintiff's insolvency is to call upon the official assignee to continue the suit ; and on his deciding to continue the suit, it may make an order for furnishing security within a specified time. It should not dismiss the suit in default because O. 9, r. 8, C. P. C., cannot apply where there is known to be no person in the position of the plaintiff who has any right or duty to appear (4).

It is to be noted that the only person who is entitled to prosecute the suit or appeal is the receiver. Thus, when pending the hearing of an appeal by the judgment-debtor to set aside an auction sale, he is adjudged an insolvent and the receiver to whom his estate has passed over, decides not to proceed with the appeal, a person claiming to be a mortgagee of the property who has so far taken no steps to assert his interests has no right to be substituted for the insolvent or the receiver and continue the appeal (5). The rule does not apply unless an

(1) *Ananthama Iyer v. Vetlah Kuttimalu*, 30 M. L. J. 611 : 34 I. C. 829 : A. I. R. 1917 Mad. 924.

(2) *Mahasukh Jhaverdass v. Valibhai Fatibhai*, 109 I. C. 152 : 30 B. L. R. 455 ; A. I. R. 1928 Bom. 177 (1).

(3) *Motumal Kishindas v. Ghanshamdass Parmanand*, 120 I. C. 84 : A. I. R. 1929 Sind 204.

(4) *Kissen Gopal v. Suklal*, A. I. R. 1927 Cal. 76 : 53 Cal. 844 : 98 I. C. 781.

(5) *Surendra Nath v. Tripura Padai*, 109 I. C. 232 : A. I. R. 1928 Cal. 215.

adjudication has *actually* taken place (1).

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Order 22, rule 10, C. P. C., applies to the devolution of interest by operation of law such as the insolvency of the defendant (2). It runs as under :—

“In other cases of an assignment, creation or devolution of any interest during the pendency of a suit the suit may, by the leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.”

This rule vests in the court a discretion in the matter of allowing the suit to be continued and the permission may be refused on sufficient grounds. Thus delay or laches will be a ground for refusing permission under the rule (3). When the lower court struck off the name of one of the defendants on the ground that he was an insolvent and that his interests had vested in the receiver it was held that the order was valid (4). If the official assignee refuses to defend a suit relating to the insolvent's property, the insolvent is not entitled to defend the suit independently of the official assignee (5). In a suit by a mortgagee for the sale of the mortgaged property against the mortgagor, if the latter is adjudged insolvent, the official assignee is a necessary party to the suit (6). The ruling in A. I. R. 1926 Madras 1145 must be considered as overruled.

Appeal.—No appeal lies to the High Court from an order under section 29, but a revision lies (7). An order directing that the receiver of an insolvent's estate should not be required to give security for costs of a suit filed by the debtor before his insolvency and continued by the receiver is not a judgment within clause 13 of the Letters Patent and is not appealable (8).

Miscellaneous.—Where pending an execution petition and an attachment the judgment-debtor is adjudicated an insolvent, no question of continuing the execution proceedings with the consent of the court arises, as the adjudication denudes the insolvent of any saleable interest in the property (9).

(1) Ramchandra v. Shripati, A. I. R. 1929 Bom. 202 (204) : 118 I. C. 252 ; Amrit Lal v. Rakhali Das, (1899) 27 Cal. 217 : 4 C. W. N. 294.

(2) Punin Thevelu v. Bhashyam, (1902) 25 Mad. 406 ; Subbayar & Bros. v. J. K. Munuswami Aiyar, 51 M. L. J. 613 : 93 I. C. 516 : A. I. R. 1926 Mad. 1133.

(3) Lakhshman Chandra Dey v. Nikunjamoni Das, A. I. R. 1924 Cal. 188 : 80 I. C. 538 ; Allah Jawaya v. Lajpat Rai, A. I. R. 1925 Lah. 574 : 94 I. C. 926 ; Harihar Prasad v. Gendi Lall, (1918) 43 I. C. 811 (Patna) : A. I. R. 1918 Pat. 606.

(4) Prince, Victor N. Narayan v. Kumar Bhairabendra, A. I. R. 1930 Cal. 388 : 125 I. C. 851 : 34 C. W. N. 53.

(5) Tribhovandas v. Abdulaly, 39 Bom. 568 : 28 I. C. 506 : A. I. R. 1915 Bom. 298.

(6) Kalachand v. Jagannath, 54 I. A. 190 : 54 Cal. 595 : A. I. R. 1927 P. C. 108 : 101 I. C. 442.

(7) Prince, Victor N. Narayan v. Kumar Bhairabendra, A. I. R. 1930 Cal 388 : 125 I. C. 851.

(8) C. Jorden v. Maung Bachit, 9 Rang. 478.

(9) Chunnilal v. Vithal, 140 I. C. 835 : A. I. R. 1933 Nag. 28.

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30. Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed.

History and Analogous Law.—This is section 16 (7) of the Act 3 of 1907. It corresponds to S. 20, Pt. I. A., S. 20 (2), B. A., 1883, and S. 18 (2), B. A., 1914.

In such other manner as may be prescribed.—See rule 6 of the Calcutta and Allahabad High Courts and rules 21 and 24 (1) of the Madras and Bombay High Courts.

Copy of Gazette is conclusive evidence.—The production of a copy of a Gazette containing any notice of a receiving order or of an order adjudging a debtor a bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date (1).

Want of publication.—Want of publication of the order of adjudication under the section is a mere irregularity and proceedings cannot be set aside without proof of prejudice (2).

Failure to deposit the costs of publication order.—An order of adjudication against a person insolvent cannot be annulled for failure to deposit costs of publication under section 30. It can only be annulled under the provisions of section 35 or section 43. Where costs are not deposited, the only remedy for the court is, under Rule 277 (3) framed by the Chief Court, to recover the costs from the insolvent's property if the property is sufficient for the purpose, or to remit the costs, if the property is insufficient (3).

Proceedings consequent on order of adjudication.

31. (1) Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct,

(1) *Ex parte French*, 1882, 52 L. J. Ch. 48 (decided under section 10 of B. A., 1869); *Hawkins v. Duche*, 37 T. L. R. 748; S. 137 (2), B. A., 1914.

(2) *Ram Komal Saha v. Bank of Bengal of Akyab*, 5 C. W. N. 91; *Gillmore v. Bulaki Lal*, 19 P. R. 1900. (F. B.)

(3) *Harkishore v. Masum Ali Khan*, A. I. R. 1930 Oudh 53 (1): 5 Luck 479: 124 I. C. 368.

and may be revoked or renewed as the Court may think fit. **S. 31.**

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release :

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order.

History.—Under the old Act the order of adjudication gave an automatic protection to the debtor from arrest or imprisonment (1). S. 16 (1) (b), P. I. A., 1907, has been repealed, and sections 23 and 31 have been newly added in the present Act. Now the grant of protection has been placed in the hands of the court. The object of the Legislature has not been completely fulfilled because of the interpretation put by courts on the last clause of section 28 (2). See *infra*. The law as it stands at present has not escaped criticism. In a case (2) Rankin, C. J., criticised the corresponding provision under the Presidency-towns Insolvency Act in the following words :—

“I would point out that in the circumstances such as the present one the law of India is extremely illogical and the position of the court would appear to be very embarrassing. Here is a man who so long ago as 26th January of last year was adjudicated an insolvent and so far as we know all his properties would vest either in the official assignee or in the receiver who would be appointed by the court. It is said that he has not disclosed his books and he has been refused the protection order. Nevertheless, the object of sending a man to jail for non-payment of debts if he is under an obligation to hand over all his assets to the court of insolvency does not appear to me very convincing; still less does it appear to be consistent with the principle that this should be done by one creditor while the assets are supposed to have been impounded on behalf of all creditors. There can be no doubt that the position in the circumstances of this case is very difficult, but speaking for myself I am not at all satisfied that the learned judge in leaving these various complaints to be dealt with in the insolvency jurisdiction did not take a wise course.”

The grant of protection is discretionary.—The protection order is a privilege to be granted or withheld as the court, in its discretion, may determine and in exercising that discretion it is relevant and proper for the court to have regard to the character and circumstances of the insolvent (3). An order of adjudication does not now operate

(1) Mallapali Gopalam Nayar v. Kopathil Gopalam, A. I. R. 1925 Mad. 915 : 91 I. C. 31 ; S. 16 (1) (b), P. I. A., 1907.

(2) Nagore Mull Mudi v. Lachminarain Gupta, A. I. R. 1929 Cal. 144 : 113 I. C. 854.

(3) (Maharaj) Hari Ram v. Srikrishna Ram, A. I. R. 1927 All. 418 : 49 All. 201 : 103 I. C. 320 ; Mahomed Roshan v. Ghulam Mohiuddin, 118 I. C. 791 : A. I. R. 1929 Bom. 135.

S. 31. automatically as a protection against execution against the person of an insolvent. The insolvent must apply to the court to grant him the privilege of protection against arrest, which the court should do only if the circumstances of the case justify. A protection order should not be refused, or if once granted, cancelled, save on exceptional grounds (1). That the insolvent is heavily indebted is hardly a ground for refusing to pass a protection order. If a debtor has been adjudged insolvent, has placed all the assets at the disposal of the insolvency court without concealing any material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted. Unless some misconduct or want of good faith can be imputed to an insolvent, a protection order should not be refused on vague and general assumptions (2).

The court is not justified in refusing to pass a protection order in favour of the insolvent on the ground of failure to produce books before the official assignee when the books were in the possession of receivers appointed in a partition suit between the insolvent and other members of the family, and when it is not shown that the insolvent had not himself taken all steps that were in his power to effect the production of the books before the official assignee (3). Where the insolvent on the date preceding his insolvency petition assigned a debt and property of considerable worth to creditors to whom he had defrauded to cover defalcations and where numerous facts falling within (a), (b), (c), (d), (f) and (j) of S. 29 (2), P-t. I. A. had been proved against him, it was held that there was good cause for the court to refuse an application for protection under S. 25, P-t. I. A., A creditor can punish an insolvent, who has acted recklessly and dishonestly, by attachment and imprisonment according to law, even if the latter is unable to pay (4). Protection should be refused to flagrant or dishonest insolvents. Where the insolvent transferred his endowment policy to his wife and carried on business since his insolvency in the name of his relations and where on reliable information the insolvent had several thousand rupees in his possession in cash and otherwise did not satisfactorily explain the disposal of his other property, protection was refused (5). In the same case it was held that an opportunity should be given to the debtor to admit, explain or deny the allegations made by the creditors.

Protection order should ordinarily be refused in respect of a debt which is not proveable in insolvency. The wording of section 31 is, it is true, wide enough to include all the debts of the debtor within its scope but in justice the court cannot stop proceedings against the debtor in respect of a debt from which he cannot be released by an order of discharge. Thus, it has been held that, assuming that section 31 applies to debts due to the Crown, an order of protection should not

(1) *P. M. Hamid v. P. K. Mohamed Shariff*, A. I. R. 1935 Rang. 415 (under S. 25, Pt. I. Act).

(2) *Beni Prasad v. Phula Mal Madan Mohan Lal*, 146 I. C. 819 : A. I. R. 1933 All. 591.

(3) *Nripendra Kumar Dutta v. Chairman of Habiganj*, A. I. R. 1926 Cal. 261 : 85 I. C. 533.

(4) *Mahomed Haji v. Abdul Rahman*, 40 Bom. 461 : 31 I. C. 507.

(5) *P. M. Hamid v. P. K. Mohamed Shariff*, A. I. R. 1935 Rang. 415.

be made because an order of discharge does not release the insolvent from such debts (1). **S. 31.**

Different considerations apply where protection is applied for before the hearing of the application for discharge. The good faith or bad faith of an insolvent does not ordinarily come under the scrutiny of the court till the application for his discharge is heard, and before discharge the court has hardly any material on which it can come to any finding as to the conduct of the insolvent. At the initial stage of insolvency the affairs of the insolvent have to be investigated and his property has to be realised; it is in the interest of the creditors themselves that this should be done and it cannot be done without considerable difficulty if the insolvent is put in jail or has to go into hiding to escape from arrest. The court must act in the interest of all the creditors and not in the interest of any particular creditor who wishes to put the insolvent in jail. The section clearly intends that if an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors, and should not be rendered liable to pressure whereby one creditor may get undue advantage over another. The insolvent is *prima facie* entitled after adjudication to an order of protection in the absence of any report against his conduct, and protection is granted as a matter of course. The court will not, on an application for an *ad interim* protection, inquire into allegations of concealment of property or into charges of fraud made against the insolvent by opposing creditors, because these are matters to be investigated at the hearing of the petition for discharge (2).

In respect of whom an order of adjudication has been made.—The provisions of section 31 can be availed of by a debtor only after an order of adjudication has been passed against him. Protection before the order of adjudication is governed by section 21.

Sub-section (2); all the debts of the debtor.—The words are wide enough to include all the debts, whatever their nature may be, for the purposes of granting protection. It has however been held that the words do not include a Crown debt (3). In so deciding, the learned judges in the case relied upon the following rule of interpretation stated by Maxwell in his "Interpretation of Statutes," (6th edition, page 244):—

"The Crown is not reached except by express words or by necessary implication in any case, where it would be ousted of an existing prerogative or interest. It is presumed that the legislature does not intend to deprive the Crown of any prerogative, right or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible."

The above view is also supported by section 44 which says that an order of discharge shall not release the insolvent from any debts due to the Crown and section 61 (1), which says that in the distribution of the property of the insolvent, there shall be paid, in priority to all other debts,

(1) Collector of Akyab v. Paw Tun U, 109 I. C. 145 : 5 Rang. 806 : A. I. R. 1928 Rang. 81.

(2) *Re Megharaj Gangabux*, (1911) 35 Bom. 47 : 7 I. C. 448 ; See also *In the matter of Dinedra Nath Mullick*, (1905) 9 C. W. N. 231 (I. I. A., 1848) ; Mulla, p. 193.

(3) Collector of Akyab v. Paw Tun U, A. I. R. 1928 Rang. 81 : 109 I. C. 145 : 5 Rang. 806.

3. 31. those due to the Crown. In an English case (1), arising under the Debtor's Act, 1861, it was held that because the Act did not expressly mention the Crown it did not bind the Crown. A debt due to a co-operative credit society under an award under S. 54, Bom. Act 7 of 1925, is not a Crown debt. It does not become so simply because the collector has taken steps under section 59 of the Act to realise it as arrears of land revenue (2).

Section 31 applies even to debts which have been contracted by the debtor after the order of adjudication (3), but the debt incurred by an insolvent after the order of adjudication is not proveable under the Insolvency Act (4). On general principles the word "debts" used in section 31 should be confined to only those debts which are proveable under the Act. When the court cannot release the debtor from such debts even by its order of discharge, it is unreasonable to assume that the legislature intended such debts to fall under section 31, which deals with *ad interim* proceedings after the order of adjudication and before the termination of insolvency proceedings.

Sub-section 3, proviso.—It has been provided that when a protection order in respect of any debt has been granted, no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled. Under section 78 the period from the date of adjudication to the date of annulment cannot be excluded in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. It has however been held, relying on the proviso, that, apart from the provisions of section 78, a decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force (5).

Sub-section 4.—Before a protection order is granted notice should generally be issued to the creditors. Any one of them may appear and oppose the grant of the order. And the protection order, in case it is granted, shall bind only those creditors who had been served with notice and failed to appear or those who appeared and were heard. A protection order of the insolvency court, on appeal, though in general terms, must be limited to the debts due to the creditors who had been impleaded as respondents and against whom the order of the first court refusing to grant protection was set aside. As between them and the insolvent alone it is operative. But it does not apply to other creditors who were not impleaded as respondents in the court of appeal and who had no opportunity of contesting the grant of the protection order. As regards them, the order of the court of first instance refusing protection, which was made after issue of notice of the application by the insolvent for a protection order to all the creditors, becomes final and hence any one of the creditors can in execution of his decree against the insolvent apply for his arrest and imprisonment (6).

(1) *In re Smith*, 1876, 2 Ex. D. 47.

(2) In the matter of Jan Mahomed Ibrahim, A. I. R. 1930 Sind 263 : 126 I. C. 751.

(3) *S. V. Smith v. Duni Chand Kapur*, A. I. R. 1933 Lah. 261.

(4) *Hira Lal v. Tulsi Ram*, A. I. R. 1925 Nag. 77 : 80 I. C. 946.

(5) *Sita Ram v. Kishan Lal*, A. I. R. 1930 All. 580 (2) : 126 I. C. 16.

(6) *Jitmal Ram Gopal v. Nathu Ram*, 138 I. C. 267 : A. I. R. 1932 All. 385.

First petition dismissed under the section, second petition lies.— S. 31.

"It has never been the practice of Commissioners in Insolvency under the Indian Insolvent Act to consider themselves bound by their previous decision on applications for interim orders when it has been a matter for their discretion ; and by no means it follows that because an application has been refused on the first occasion, it must also be refused on the second occasion" (1). Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a court in granting an order of protection which has been previously refused (2).

Is an execution application for the debtor's arrest after the order of adjudication barred ?—It is enacted in section 28 that on the making of an order of adjudication no creditor shall, during pendency of the insolvency proceedings, commence any suit or other legal proceeding, except with the leave of the insolvency court. The question has arisen whether in view of section 31 of the Act and the repeal of section 16 (1) b of the Act III of 1907, applications for the arrest of the debtor after the order of adjudication lie or not and as to whether, on such an application, the debtor is liable to arrest in the absence of a protection order under section 31. There is a conflict of decisions on the point. It has been held by the Madras, Lower Burma, Lahore and Patna High Courts that such an application is barred under section 28 (2) (3). The contrary has been held by the Allahabad, Bombay and Rangoon High Courts (4).

Appeal.—No appeal lies to the High Court against an order passed under the section. A revision, however, lies.

Miscellaneous.—The fact that the judgment-debtor had got a protection order does not absolve the surety of his duty to produce the judgment-debtor on the adjourned date (5). A judgment-debtor was arrested in execution of a money decree. He was given time to furnish security. In the meanwhile he got himself adjudicated an insolvent under the Presidency-towns Insolvency Act (1909), and produced a protection certificate from the Calcutta High Court as well as a copy of the schedule showing that the debt for which he was arrested was included in it. It was held that under the said circumstances the judgment-debtor was immune from arrest and detention in the civil prison on account of the said debt (6).

(1) In the matter of Meghraj Gangabux, 25 Bom. 47 : 7 I. C. 448.

(2) Beni Prasad v. Phula Mal Madan Mohan, 146 I. C. 819 : A. I. R. 1933 All. 591.

(3) Eswara Aiyar v. Govindarajulu, 39 Mad. 689 : A. I. R. 1916 Mad. 734 (2) : 31 I. C. 192 ; Thakurdeen v. J. Dubay, 12 B. L. T. 218 : 55 I. C. 250 : A. I. R. 1920 L. B. 45 ; Partapsingh Pardhansingh v. Firm Bhai Rewasingh Jodhsingh, 107 I. C. 608 : A. I. R. 1928 Lah. 258 ; Hit Narayan Singh v. Brij Nandan Singh, 10 Pat. 422 : A. I. R. 1931 Patna 357 : 134 I. C. 633.

(4) Hari Ram v. Lachhmi Narain Mahajan, 54 All. 416 : 140 I. C. 150 (2) : A. I. R. 1932 All. 188 ; Mohamad Roshan v. Gulam Mohiuddin, A. I. R. 1929 Bom. 135 : 118 I. C. 791 ; Viswanathan Chettyar v. Abdul Majid, A. I. R. 1925 Rang. 305 : 89 I. C. 381 : 3 Rang. 187 ; P. M. Hamid v. P. K. Mahomed Shariff, A. I. R. 1935 Rang. 415.

(5) Nachiappa Chettiar v. Kandappan Chettiar, 97 I. C. 413 : A. I. R. 1926 Mad. 958 (facts important).

(6) Mahomad Abdul Ghafar v. Mahabir Parshad & Sons, A. I. R. 1930 Lah. 1070 : 128 I. C. 314.

. 32,
13.

32. At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

History.—This section is new. It gives the insolvency court power to arrest the debtor after adjudication, whereas section 21 deals with the powers of the court to arrest before adjudication.

Applicability.—Before issuing the warrant for arrest it must be proved to the satisfaction of the court: firstly, that the debtor has absconded or departed from the local limits of the court's jurisdiction; and secondly, that he has done it with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act. The word "obligation" referred to in the section would seem to refer to the duty of the insolvent to aid in the realisation and distribution of his property mentioned in section 28 (1) of the Act (1).

At any time after an order of adjudication has been made.—The expression means at any time after adjudication and before the insolvency proceedings are terminated. An insolvency proceeding will be considered as pending where the receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge (2). Where the court, under the provisions of section 42, refuses the discharge of the insolvent, as far as that court is concerned, the proceedings are terminated (3). The expression "during the pendency of the insolvency proceedings" occurs in section 28 (2) also. Cases noted there may be consulted.

33. (1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to

(1) Mulla, page 217.

(2) Jeevanji Momooji v. Ghulam Hussain, 47 I. C. 771.

(3) Maung Po Toke v. Maung Po Gyi, A. I. R. 1926 Rang. 2 : 3 Rang. 492 : 92 I. C. 142.

be creditors of the insolvent in respect of such debts, and the amount of such debts respectively, and shall frame a schedule of such persons and debts : S. 33

Provided that if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the [receiver] (1) and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

History.—This is section 34 of the Act 3 of 1907. In sub-section (3) the word “receiver” was substituted for the word “insolvent” by the amending Act 39 of 1926. The amendment is in accordance with the principle of the English Law that the bankrupt himself has no *locus standi* to litigate with proving creditors as to the amount of their debts. Under the old Act it was held that where proceedings are continued against the deceased debtor, his representatives should be permitted to cross-examine claimants and witnesses and give rebutting evidence (2). The Civil Justice Committee had criticised the old law in the following words :—

“The provision of sub-section (3) of section 33 is that any creditor may apply for an order directing his name to be entered in the schedule and that the court, after causing notice to be served on the insolvent and other creditors, and hearing their objections, if any, shall comply with or reject the application. This seems to involve that under the Act the insolvent is a person who is to be heard upon the admission of any proof of debt. The notion that an insolvent is a person entitled to litigate with proving creditors about the amount of their debts is unfortunate. A main principle of bankruptcy in England is that the insolvent goes out of the picture for such purposes altogether; all the property is vested in the receiver; the receiver stands in his shoes; the other creditors, not the insolvent, are interested in the distribution of an insufficient fund.” The words “who have proved their debts” in sub-section (3) were added in 1920 to shorten proceedings by obviating the necessity of issuing notice to all creditors. Under the old Act III of 1907 (as well as

(1) This word was substituted for the word “insolvent” by section 2 of the Provincial Insolvency (Amendment) Act (39 of 1926).

(2) *Sripat Singh v. Prodyat Kumar*, 48 Cal. 87 : A. I. R. 1921 Cal. 219 : 57 I. C. 810.

- S. 33.** the Insolvency Chapter of the old Civil Procedure Code) an order of discharge released the debtor from those debts only which were entered in the schedule framed under section 24, P. I. A., 1907. It was accordingly held that a creditor who did not come in and prove his debt in insolvency proceedings was not barred to recover it by ordinary means after the termination of the insolvency proceedings (1). Under the present Act an order of discharge releases the debtor from all provable debts whether proved in insolvency or not. Still the framing of the schedule has an important place in the scheme of the Act.

Framing of schedule.—The section provides that the creditors shall tender proof of their respective debts and the court shall by order determine the persons who have proved themselves to be the creditors of the insolvent and the amount of their debts. It is not a mere piece of empty formality; the legislature has intended the court to perform a judicial act (2). The framing of the schedule is the duty of the court, not of the receiver. Though a report from the receiver may in some cases assist the court, it is for the court to decide each claim on evidence, and, in case of contest, after hearing necessary parties (3). The receiver's report is only evidence and not conclusive to prove a debt (4). It is open to any creditor of the insolvent to challenge the validity of the debt set up by another creditor, and if he does so the court is bound to enquire into the matter and it should not refer the applicant to a separate suit (5).

The mode of proof is provided by section 49 of the Act. A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the court an affidavit verifying the debt; and in the affidavit a statement of account showing the particulars of the debt and a specification of the vouchers which support it, shall be given by the creditor. Where different creditors file affidavits before the official receiver (to whom powers have been delegated under section 80) in proof of such debts it is his duty to enquire into the matter and he should not accept the affidavits without question (6). It was, however, held in *A. I. R. 1918 Mad. 206* (7) that in practice the operation of the framing of the schedule is intended, at least in general, to be an *ex-parte* determination by the court upon the evidence furnished by the alleged creditors. If this power is delegated to the official receiver it is merely that he is to frame the schedule after an *ex-parte* examination of the evidence tendered by the alleged creditors and that he does not decide judicially or finally upon contested claims. However it may be, this much is clear that at the time of framing the schedule under section 33 the rights of the person proving are not finally and once for all determined. Afterwards it is always open to the receiver to move the court under section 50 for disallowing or reducing any entry which, in his opinion, has been improperly entered. An entry of a mortgage-debt in the schedule cannot debar the receiver from making an application for avoiding alienations under sections 53 and 54 in respect of those debts.

(1) *Haro Pria Dabia v. Shama Charan Sen*, 16 Cal. 592; *Arunachala v. Ayyavu*, 7 Mad. 318; *Ashraf-ud-Din Ahmed v. Bepin Behari Mullick*, 30 Cal. 407.

(2) *Walaiti Ram v. Partap Singh*, A. I. R. 1932 Lah. 173; 135 I. C. 194.

(3) *Behary Lal v. Harsukh Das*, 61 I. C. 904; A. I. R. 1921 Cal. 376.

(4) *Amir Chand v. Ankul Chandra*, 90 I. C. 802; A. I. R. 1926 Cal. 160.

(5) *Khushhali Ram v. Dholar Mal*, A. I. R. 1915 All. 81 (1); 28 I. C. 573; 37 All. 252.

(6) *In re Moosaji Lotia*, 15 I. C. 825; 5 S. L. R. 249.

(7) *S. K. Mohideen Kadirshaw Maraikar v. Official Receiver*, A. I. R. 1918 Mad. 206; 41 Mad. 30; 45 I. C. 67.

Scope.—Under sub-section (1) the court is to prepare the schedule of all the creditors; that is a main proceeding provided for proving debts. It is, however, open to a creditor who had no notice of the insolvency proceedings earlier, or who could, for some reason or another, could not prove a debt of his in the first instance may come in under sub-section (3) and tender proof of his debt. The section provides a somewhat different procedure when creditors come in the first instance and when a particular creditor comes at a late stage. At the time of framing the schedule under sub-section (1) the court is not bound to issue notice to all the creditors, but has to decide the names of the creditors and the amount of their debts on the material which is then available. Where proof is tendered after the schedule has been framed, the court must cause notice to be served on the receiver and the other creditors who have already proved their debts. If the court admits the proof without giving the requisite notice, the order will be set aside on appeal (1). It is incumbent for the petitioning creditor to prove his debt under the section and it is equally incumbent for the receiver to examine its proof. He may reject it even though it was held a good debt for presenting the petition, if he finds that the claim is not proved (2).

Power of court for enquiry into consideration of debts.—The court of bankruptcy as a court of equity has always enquired into the consideration of debts and, if no debt existed in equity, rejected the proof, and this, even though the person seeking to prove has recovered a verdict. In the case of *Ex parte Kibble, In re Onslow* (3). Sir W. M. James, Lord Chief Justice : said .—

“ It is the settled rule of the court of bankruptcy on which we have always acted that the court of bankruptcy can enquire into the consideration for a judgment-debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due to them at all. It is, therefore, necessary that the consideration of the judgment should be liable to investigation” (4).

This power exists even where the debtor has consented to the judgment (5), not only so but it will always do so if the circumstances are suspicious, and if the claimant cannot prove the consideration the proof will be rejected (6). It will also be true where the case was compromised. Accordingly, in a case which came on for trial, but was compromised before the plaintiff's case was opened on the terms of the defendant paying the plaintiff £ 400 and taxed costs in full settlement, and such terms were embodied in a Judge's order, the Court of Appeal held that they would go

(1) *Allahabad Bank, Ltd., Cawnpore v. Murlidhar*, (1912) 34 All. 442 : 14 I. C. 589.
 (2) *Sobharaj Dayaram v. Official Receiver, Sind*, 146 I. C. 221 (2) : A. I. R. 1933 Sind 313 (1).
 (3) 1875, 10 Ch. 373 : 23 W. R. 433 : 44 L. J. K. B. 63 : 32 L. T. 138.
 (4) Quoted in *Ram Lal Tandan v. Kashi Chand*, A. I. R. 1928 All. 380 ; 108 I. C. 147.
 (5) *Exp. Lennox*, 16 Q. B. D. 315.
 (6) *Anderson Exp.* 14 Q. B. D. 606.

S. 33 behind the compromise, and they refused to admit a proof founded upon it, since they could see that the original claim was not made *bona fide* (1). This power will, however, not be exercised where the parties at the time of compromise were represented by independent counsel in the absence of evidence that counsel acted improperly or without full knowledge of the facts (2).

The same principle will apply where there has been judgment by default without collusion (3). It is not necessary that fraud or collusion should be shown. It is sufficient if it can be shown that there ought not to have been a judgment (4). A receiver can order enquiry into the validity of a debt to enter it in the schedule, even though that debt has been held genuine by the court in an enquiry under section 53. As a rule when this is the case, it is much better for the receiver to admit it and put the onus for getting it expunged from the schedule on the other creditors (5).

A judgment is proved by a certified copy of an entry in the judgment book of the court where it was recovered (6). The rule as to going behind a judgment does not apply to an assessment for taxes, and on a proof for taxes the court of bankruptcy will not enquire into the amount of the assessment (7).

When should the court go behind the judgment.—A judgment would always give a *prima facie* proof of a debt. It is only when there are circumstances casting doubt on the correctness of the debt, as proved by the judgment, that the judgment may be set apart, and independent proof may be called for. Where there has been a genuine contest between a claimant or a creditor on the one hand and the company which goes into liquidation later on, and the parties have fought out the case *bona fide*, it should not be open to the official liquidator to reopen the case and to have, as it were, a fresh trial of strength. But, on the other hand, where the decree rests on something less than a real trial on the merits of the case, the question would arise whether the official liquidator would not be justified in putting the decree aside and asking for what has been called the "consideration for judgment." Where, therefore, a judgment is obtained on the confession of the insolvent it is open to the liquidator to set the decree apart and to ask for proof of the claim (8). The court will not as a matter of course inquire into the validity of a judgment-debt except when there is evidence that the judgment has been some mis-carriage of justice (9).

(1) *Exp. Banner*, 17 Ch. D. 480.

(2) *Re a Debtor*, (1928) B. & C. R. 34.

(3) *Exp. Mudie*, 3 M. D. & D. 66; *Exp. Kibble*, L. R. 10 Ch. 373; *Exp. Chatteris*, 26 L. T. 174; *Re a Debtor*, (1927) 2 Ch. 367.

(4) *Ali Mahomed Gulam Hussein v. The Deccan Match Manufacturing Co., Ltd.*, A. I. R. 1932 Bom. 253; 138 I. C. 442.

(5) *In re Malavaraya Padayacha*, A. I. R. 1937 Mad. 151.

(6) *Exp. Anderson*, 14 Q. B. D. 606; S. 76, I. E. A.

(7) *Re Calvert*, (1899) 2 Q. B. 145.

(8) *Re Union Indian Sugar Mills Co., Ltd.*, (in Liquidation) *v. Brij Lal Jagannath*, A. I. R. 1927 All. 426; 49 All. 723; 102 I. C. 756 (under Companies Act, 1913, Ss. 229 and 228).

(9) *Ali Mahomed Gulam Hussein v. The Deccan Match Manufacturing Co.*, A. I. R. 1932 Bom. 253; 138 I. C. 442.

Rule of enquiry into covenant or account stated.—The same principle applies where the bankrupt has given a covenant for payment, or an account has been stated with him, and the trustee has the same right to require evidence that the debt is a real one. The rule was very clearly expressed in the case of *Van Laun, In re* (1), where it is said (Pages 162 and 163):—

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“The trustee’s right and the duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.”

It, therefore, follows that a presumption of receipt of full consideration, arising from a debtor’s signature on a promissory note, can only be invoked against the debtor personally but not against the official receiver or a creditor in insolvency proceedings (2). Although a Hindu insolvent governed by the law of the Mitakshara admitted a certain debt to be a good debt, his sons can attack a decree as *benami* on their own behalf as coparceners with their father and it is the duty of the insolvency court under section 33 to adjudicate as to whether the debt is, as a matter of fact a good debt or not (3).

In respect of debts provable under the Act.—For that see section 34.

Sub-section (1), proviso.—For that see section 34 (1), first part.

Person by whom proof to be made.—As a general rule the person to prove is the person to whom the debt is due either at law or in equity. The rules which govern the right of proof are almost the same as those which govern the right to present a petition. We will consider the case of different persons under separate headings.

1. Minor.—A guardian of a minor may prove on behalf of the minor.

2. Married woman.—A married woman may prove without joining her husband in case where she may sue alone. Under the English law a claim for dividend by a husband in his wife’s bankruptcy, and by a wife in her husband’s bankruptcy is postponed to the claims of other creditors under certain circumstances. Under the Indian law, however, such debts rank equally with the debts of other creditors.

3. Executor or administrator.—The executor or administrator, as the case may be, is the right person to prove in respect of debts due from the bankrupt to the testator or the estate. Unlike the English law, an executor to whom a debt is due from the estate of the testator has no right of retainer under the Indian law (4).

(1) 1895, 1 Q. B. 404.

(2) *Ram Lal Tandon v. Kashi Charan*, A. I. R. 1928 All. 380 : 108 I. C. 147 ; *McCurby, In re*, 26 S. L. R. 279 : A. I. R. 1932 Sind 197 (S. 118, Negotiable Instruments Act was not applied).

(3) *Sreeput Singh v. Ram Sarup*, 95 I. C. 463 : A. I. R. 1926 Cal. 982.

(4) Indian Succession Act, 1925, S. 323 ; Mulla, page 291.

S. 33. 4. Benamidar.—Under the Indian law a benamidar can sue for the debt but it has been held that he cannot prove in insolvency (1).

5. Secured creditor.—The right of a secured creditor to prove in insolvency has been specifically dealt with in section 47. See full notes under that section.

Assignees of creditor.—Under the old English practice the assignee of a debt assigned after adjudication could not prove, but had merely a right to call on the assignor to prove as trustee for him (2). The modern practice on this point is, however, different. Now, an assignee of the debts due to creditors who have proved cannot obtain an order of payment to him of the dividends, but after satisfying the trustee of the validity of the assignment, he can apply to the court to give leave to the trustee to place on the file a proof by him in substitution for the proofs of the assignors (3). Form 176 also provides for giving an authority to the trustee to hand over dividends to a person other than the creditor proving (4). In an Indian case (5), one J who had a debt due from K assigned it to B in consideration of a certain sum. K became insolvent. B applied to have his name placed in the schedule of creditors. J admitted the assignment. It was held that as the assignment was admitted by J, the question of consideration did not arise as between B and K; and B was entitled to be placed on the schedule of creditors, irrespective of whether there was consideration for the assignment or not, that J might well have gifted the debt to B and yet the latter would have a valid claim.

Surety.—A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the "surety," the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor.

A guarantee may be either oral or written (6). Again the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract (7).⁴ The creditor can prove in the insolvency of the principal debtor for the whole debt because he can recover his debt from either the principal or the surety. In case the creditor has proved, the surety will not be allowed to prove in respect of the same debt because it will violate the rule of double proof. Where the creditor does not prove the surety can, even if he has not paid anything to the creditor, as his debt is a contingent debt (8) and as such it is provable in insolvency (9). If the surety has paid the whole debt to the creditor before proof, it is the surety and not the creditor who has a right to prove. If the surety pays the whole debt after proof, the creditor will be a trustee

(1) *Ketaki Charan v. Sarat Kumari*, 20 C. W. N. 995 : 37 I. C. 71.

(2) *Exp. Dickenson*, 2 D. & C. 520.

(3) *Re Frost*, 1899, 2 K. B. 50; *Re Iliff*, 51 W. R. 80 followed in the case of an equitable assignee: in *Re Hills*, 107 L. T. 95. (cited in Williams page 379).

(4) Williams, page 379.

(5) *Behari Lal v. Abdul Khalik*, A. I. R. 1930 Lah. 235 (1) : 119 I. C. 496.

(6) S. 126, Contract Act, 1872.

(7) S. 128, C. A. 1872.

(8) *Roderiques v. Ramaswami*, 40 Mad. 783 : 38 I. C. 783 : A. I. R. 1917 Mad. 39; *Gangadhar v. Kanhai*, A. I. E. 1928 All. 306 : 109 I. C. 421 : 50 All. 606.

(9) *Re Paine*, (1897) 1 Q. B. 122; *Re Herepath and Delmar*, 7 Mor. 129;

of the dividends for him. He will be entitled to the benefit of the proof made by the creditor, and the creditor must account to the surety for any dividends already received by him (1). Where a man, engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid (2). Generally, a surety cannot receive anything until the creditor has been paid 20 shillings in the pound (3). If the creditor has proved, the surety can only prove for the interest on the balance remaining due after the creditor has received the dividends (4). **S. 33.**

Where the liability of the surety is not co-extensive with that of the principal debtor but is only limited, the surety's right of proof depends upon the construction of the contract between them. A surety may guarantee part only of a debt or he may guarantee the whole debt with a limit of liability. Where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal debtor to the creditor, a guarantee is *prima facie* for part only of the debt; but a guarantee, limited in amount for a debt already ascertained which exceeds that limit, is *prima facie* a guarantee for the whole debt with a limit of liability. The leading English case is *Ellis v. Emmanuel* (5), where all the earlier cases were reviewed by the Court of Appeal. There it was pointed out that there is a distinction between a guarantee limited in amount to secure a floating balance, and one limited in amount for a debt already ascertained which exceeds that limit and that it is a question of construction whether the intention was to guarantee the whole debt with a limit of liability, or to guarantee a part of the debt only. In the leading case the surety and the principal debtor passed a bond to the creditor to secure a debt of £7,000 then due from the debtor to the creditor with a proviso that the surety should not be liable under the bond for a sum exceeding £1,300. It was held that the guarantee was for the whole amount with limit of liability, and that the surety was not entitled on payment to any part of the dividends received by the creditor. In another case (6), the guarantee was in these terms: "I hereby guarantee to you the payments of all goods you may supply to E, but so as my liability to do under this or any of a guarantee shall not any time exceed the sum of £250." The creditor supplied goods to the amount of £657. E then became bankrupt. The creditor proved for the whole sum and then called upon the surety to pay and the surety paid £250. The creditor afterwards received a dividend on £657. It was held that the guarantee was for part only of the debt, and that the surety was entitled to a part of the dividend bearing to the whole the same proportion as £250 to £657. Where the surety has given a contingent guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor (as was the case in the ruling cited), the guarantee is, as between the surety and the creditor, to be construed as applicable to a part only of the debt, co-extensive with the amount of his guarantee, and this on the ground that it

(1) *Re Sass*, 1896, 2 Q. B. 12, 15.

(2) *Exp. Rushforth*, 10 Ves. 101, *per* Lord Eldon; *Gray v. Seckham*, L. R. 7 Ch. 680.

(3) *Exp. Turquand*, 3 Ch. D. 115.

(4) *Re Pyke*, 55 S. J. 103.

(5) 1 Ex. D. 157.

(6) *Hobson v. Bass*, 1871, L. R. 6 Ch. App. 792.

- S. 33.** is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety (1).

From the above the following propositions of law are deducible :—

1. Where the surety has given a continuing guarantee limited in amount to secure a floating balance, the guarantee is for a part of the debt only.

2. Where the guarantee is for a part of the debt only that part is, as between the surety and the creditor, the whole debt and if the surety pays that part, then, by virtue of that payment, the right of proof, which would have been the right of proof of the principal debtor, becomes *pro tanto* the right of proof by surety. The surety has a right, having paid part of the debt in that way, to stand *pro tanto* in the shoes of the principal creditor; and even if the principal creditor has proved and has received the dividend, the principal creditor would then be the trustee for the surety for the amount of the dividend which he has so received to the extent of that part.

3. If the guarantee is for a limited amount for a debt ascertained that exceeds that amount, it is a guarantee for the whole debt with a limit of liability.

4. If the guarantee is for the whole debt with a limit of liability the surety is not entitled to any share of the dividends received by the creditor in the principal debtor's insolvency. Only that the creditor can recover from the surety the amount of the debt less the dividends so received.

5. All depends upon the contract of the parties. The contract of suretyship may be such, however, as to exclude the surety from having any equity to stand in the place of the principal creditor as to dividends received from the debtor's estate (2).

A surety cannot petition against a co-surety who has not been released by the creditor unless he has paid more than his proportion of the debt due (3), but it has been held that the liability of the co-surety to contribution, though unascertained at the date of the bankruptcy by reason that the proving surety has paid nothing, forms a provable debt (4). A surety who has paid the debt is entitled to all securities held by the creditor (5), and a co-surety who has paid the creditor in full, and taken an assignment of his securities under the statute, is entitled to prove as assignee of the creditor against his co-surety for the full amount but can only recover the just proportion to which, as between the sureties, he is entitled (6).

From a proof on a guarantee must be reduced payments made by, or dividends declared on the estate of the principal debtor before proof is made, but such payments or dividends received after proof is made need not be deducted (7); nor need payments made by other sureties, at least

(1) *Ellis v. Emmanuel*, 1 Ex. 157.

(2) *Midland Banking Company v. Chambers*, L. R. 4 Ch. 398; *Exp. National Provincial Bank*, 17 Ch. D. 98.

(3) *Exp. Snowdon*, 17 Ch. D. 44.

(4) *Wolmershausen v. Gullick*, 1893, 2 Ch. 514.

(5) *Duncan, Fox & Co. v. N. and S. Wales Bank*, 6 App. Cas. 1.

(6) *Re Parker*, 1894, 3 Ch. 400.

(7) *Re Blakeley*, 9 Mor. 173.

where each surety is liable for the whole debt, provided the creditor does not receive more than 20 shillings in the pound all told (1). **S. 33.**

Double proof.—Where there is one estate there can be in no case two proofs of one debt, and this even though there may be separate contracts in respect of the same debt. "The true principle is that there is only to be one dividend in respect of what in substance is the same debt, although there may be two separate contracts (2). If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors and perhaps get his debt paid in full" (3). This may be explained by an illustration. A mortgages his property to B. Subsequently A transfers the equity of redemption of the property to his wife and covenants with her to discharge the mortgage debts, so that the wife may get the property free from the charge. The mortgage debt is not paid and A becomes insolvent. A proof is put on behalf of the mortgagee. The wife is not entitled to prove in respect of the covenant to discharge the mortgage debt. Here the debtor has entered into two covenants with two different persons to pay the debt. He has entered into a contract with the mortgagee and also with his wife, but they are both covenants to pay the same debt, and if they were both allowed to prove in respect of that debt, higher dividends would be paid in respect of that debt than in respect of his debts to other creditors. This would violate the rule against double proof, and the wife therefore cannot be allowed to prove (4). Where the mortgagees of a policy of insurance on which the bankrupt had covenanted to pay the premiums valued the policy and proved for the balance of their debts, it was held that they could not also prove for the value of the covenants to pay premiums (5). It is this principle which prevents sureties from proving when the principal creditor has already proved. It is otherwise where there are two estates, even though they are the estates of two firms composed in whole or in part of the same individuals.

Holders of bills of exchange.—The holder of a bill of exchange is entitled to prove his debt in the bankruptcies of all the prior parties to the bill, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than 20 shillings in the pound (6). But where a creditor applies to prove his debt after having received a part, he can only prove for so much as remains unpaid; and this is true not only if he has actually received a part of the bill before proof, but even if a dividend on another bankruptcy has been declared (7). If, however, after having proved for the whole, he receives a part from any person liable, he is entitled to a dividend upon the whole provided it does not exceed 20 shillings in the pound upon such part as remains due (8). The

(1) *Re Houlder*, 1929, 1 Ch. 205.

(2) *Re Oriental Commercial Bank*, L. R. 7 Ch. 99; *Re Hoey*, 88 L. J. K. B. 273.

(3) L. R. 7 Ch. App. 99 *supra*.

(4) *Re Hoey*, (1918-1919) B. & C. R. 49.

(5) *Deering v. Bank of Ireland*, 12 A. C. 20.

(6) *Exp. Rushforth*, 1805, 10 Ves. 409; 32 E. R. 903.

(7) *Cooper v. Pepys*, 1 Atk. 107; *Exp. Wildman*, 1 Atk. 110; *Exp. Tailor*, 26 L. J. Bank 58.

(8) *Ibid.*

- S. 33.** true principle to be applied in these cases is that proof should only be admitted for that sum for which an action could have been maintained by one party against the other if the bills had remained in the situation in which they were actually found and if there had been no bankruptcy (1).

As to whether an action lies in a particular case or not is to be determined by the ordinary law applicable to negotiable instruments. In India it shall be determined by the Negotiable Instruments Act. The law of negotiable instruments and rights of the parties to such an instrument are fairly complicated and without a full reference to the Act it is not easy to determine as to whether an action is maintainable or not.

A creditor who has already proved for one debt.—The words of section 33 (3) are sufficiently wide to include a person who has already proved one or more debts but who wishes to prove a further debt which, for some reason or other, he has omitted (2).

Persons, transfers in whose favour have been set aside under Sections 53 and 54.—See commentary under section 53.

Proof may be tendered at any time before the discharge of the insolvent.—In schedule 2 rule 1 of Presidency-towns Insolvency Act and in the Bankruptcy Act, 1914, it is provided that every creditor shall lodge the proof of his debt as soon as may be after the making of an order of adjudication. These words have been interpreted under both the Acts as giving the creditor a right to prove his debt at any time, so long as there are assets to be distributed and no injustice is done to other parties (3). Dealing with this question Vaughan Williams, L. J., said (+), "Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the court. If that is so, leave must be granted upon such terms as the court may think just." The words "as soon as may be after the making of an order of adjudication" are directory.

Under the Provincial Insolvency Act the section is at first sight explicit but those words must be read in the light of section 63, under which debts can be proved until a final dividend is declared and the fact

(1) *Exp. Macredie*, L. R. 8 Ch. 535, per Lord Selborne, L. C.

(2) *Gokul Chandra Roy v. Radha Govinda Shaha*, 97 L. C. 1013 : A. I. R. 1926 Cal. 1210.

(3) *Exp. Boodam, re Taylor*, 2 DeG. F. & J. 625 ; *McMurdo, In re*, *Perfield v. McMurdo*, (1902) 2 Ch. 634 : 71 L. J. Ch. 691 : 86 L. T. 814 : 50 W. R. 644 ; *Krishna Chinnoo and Sons v. Matubhai*, (1929) 53 Bom. 290 : 117 I. C. 440 : A. I. R. 1929 Bom. 107.

(4) *Re McMurdo*, (1902) 2 Ch. 634, 699 ; *Re Ramchandra Ganuji Waikar*, (1922) 29 Bom. L. R. 1167 ; *Krishna Chinoo and Sons v. Matubhai*, (1929) 53 Bom. 290 : 117 I. C. 440 : A. I. R. 1929 Bom. 107 ; See P-t. I. A., S. 72 ; Prov. I. A. S. 63.

that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. This reference to the right to prove before discharge does not correspond with anything in the Presidency Act or English law ; and it is possible that it was worded with reference to the description of debts provable under the Act in Section 34, as including those to which the debtor becomes subject before his discharge by reason of obligations incurred before the order of adjudication. Accordingly, it has been held that the words "any creditor may, at any time before the discharge of the insolvent, tender proof of his debt" are not restrictive but merely directory and non-compliance with them does not in any way deprive any creditor of his right or limit his right to prove (1). It has also been held that no period of limitation having been in fact prescribed in the Provincial Insolvency Act for applications by creditors to be entered in the schedule of creditors, the matter was intended to be left to the discretion of the insolvency court. Exercising this discretion, it was further held that it is inequitable to allow a creditor, who was actually called upon to prove his debt within a period fixed by the court, and who has not proved either within that period or for a number of years thereafter, and who has offered no explanation of his delay or excuse for his laches, to come in and prove his debts, in spite of that delay and laches, at a time when execution of the decree in which the debt has become merged would be long time-barred (2).

Again, the discharge contemplated in section 33 (2) does not mean a conditional discharge (3). Where, therefore, the lower court granted the insolvent a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the court all property he might afterwards acquire, it was held that such an order of discharge did not debar a creditor from proving his debt afterwards (4).

In S. 352, C. P. C., 1882, (corresponding to S. 33, P. I. A., 1920) no special time was fixed for proving claims. Under that Act also it was held that it is open to a creditor, at any time till the assets of an insolvent are distributed, to produce evidence of his debt and to apply to be admitted in the schedule (5).

Right of a creditor who comes late.—When a creditor comes under sub-section (3), the court shall cause notice to be served on the receiver and the other creditors who have proved their debts and hear their objections (6). In the case of creditors who come in early and are admitted under sub-section (1), the other creditors who come late have no right to be heard.

Insolvent's right to contest a creditor's proof of debt.—By the Act XXXIX of 1926 the word "receiver" was substituted for the word "insolvent" in sub-section (3). The amendment was based on the general principle

(1) *Sivasubramania Pillai v. Theethiappa Pillai*, A. I. R. 1924 Mad. 163 : 75 I. C. 572 : 47 Mad. 120.

(2) *Jan Bahadur Singh v. Bailiff of the District Court of Toungoo*, A. I. R. 1927 Rangoon 263 : 101 I. C. 816 : 5 Rang. 384.

(3) *Sivasubramania Pillai v. Theethiappa Pillai*, 75 I. C. 572 : 47 Mad. 120 : A. I. R. 1924 Mad. 163 ; *Babu Lal Sahu v. Krishna Prashad*, A. I. R. 1925 Pat. 438.

(4) A. I. 1924 Mad. 163 *supra*.

(5) *Lakshmanan v. Muttia*, 11 Mad. 1.

(6) *The All. Bank, Ltd., v. Murlidhar*, 34 All. 442 : 14 I. C. 589.

- S. 34.** that an insolvent is not a person entitled to litigate with proving creditors. Under the section, as it stands now, the insolvent has no right to be heard at the time of framing the schedule of debts (1).

Amendment or withdrawal of proof.—In the case of an evident mistake, amendment of proof was allowed after the creditor had voted in the choice of a trustee (2). The same power exists under S. 152, C. P. C. (3).

Delegation of power to official receiver.—Section 80 provides *inter alia* for the delegation to the official receiver of the power to frame schedules and to admit or reject proofs. Where such power is delegated the schedule is framed by the official receiver (4). But he does not decide in doing so judicially or finally upon contested claims (5). In all other cases the schedule must be framed by the court. A receiver other than an official receiver has no power to frame it (6). A receiver is a proper party in matters between creditors and third parties. In such cases the receiver does without doubt properly represent the whole body of creditors; but this proposition is clearly inapplicable to a case of dispute among the creditors themselves, where the interest of some of the creditors are adverse to the interest of others. In such matters the receiver is not a proper party but the creditors concerned are the proper parties. Hence if any creditor wishes to have any amendment made of the schedule as framed by the court under S. 33 he must, of course, cause notice to issue to all the other creditors who would thereby be affected, and their objections must be heard before any alteration or amendment of a schedule can be ordered by the court, and in an application or appeal in connection with this the receiver is not a necessary party (7).

When is a debt proved.—*Vide* notes under section 78, sub-section (2).

34. (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.

(2) Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an

(1) *Ganga Sahai v. Mukarram Ali*, A. I. R. 1926 All. 361 : 97 I. C. 556 ; See *contra* *Kanto Mohan Mullick v. J. C. Galstaun*, A. I. R. 1930 Cal. 547 (2) : 126 I. C. 754, a case on S. 38, P-t. I. A.

(2) *Exp. Schofield*, 12 Ch. D. 337.

(3) *Ram Chander v. Mozhar Hussain*, 51 I. C. 55 : A. I. R. 1919 All. 264 ; See also cases cited in William's on page 173.

(4) See *Khadirshaw Maraiakar v. Official Receiver, Tinnevely*, (1918) 41 Mad. 30 : 45 I. C. 67 : A. I. R. 1918 Mad. 206.

(5) *Ibid.*

(6) *Behari Lal Sikdar v. Harsukh Das Chakmal*, 61 I. C. 904 : A. I. R. 1921 Cal. 376.

(7) *Mo Po Yeik v. Power*, A. I. R. 1934 Rang. 112 : 150 I. C. 960.

insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act. S. 34.

History.—The present section has taken the place of section 28 of the Act 3 of 1907. Sub-section (1) of the present Act was sub-section (2) except for the addition of the words “debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and”. Sub-section (2) is sub-section (1) of the old section except for a minor alteration giving effect to the change of arrangement of the sub-sections. The alterations are not material because debts incapable of estimation were excluded from the schedule even under the old Act and because an order of discharge formerly released the debtor from the scheduled debts only, such debts remained still recoverable after discharge. These debts have now been included in section 34 as being not provable in insolvency because of the extended effect given to an order of discharge under section 44 of the present Act.

Analogous law.—The corresponding sections of the Presidency-towns Insolvency Act and the Bankruptcy Act, 1914, are sections 46 and 30 respectively. The latter two sections are similarly worded except for a few differences. Under the English Act, a debt advanced subsequent to the date of the creditor's having notice of any act of bankruptcy against the debtor is not provable. Under the Presidency-towns Insolvency Act a person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice. Under both these Acts, contingent debts or liabilities or any other debts which for any other reason do not bear a certain value have to be estimated as regards their value by the official assignee. Under the Provincial Act this power exists in the court, notwithstanding the omission of an express provision to that effect. Under the Provincial Insolvency Act, a debt advanced by a person before the order of adjudication is provable, even though the creditor had notice of the act of bankruptcy or the presentation of the insolvency petition. Besides, there is an explanation defining the word “liability” and possibly extending its meaning in the English and Presidency Acts. This has been omitted in the present Act.

Scope.—The section is very widely worded and every possible demand, every possible claim and every possible liability, except for personal cause, is to be the subject of proof in bankruptcy. The broad purview of the Act is that the bankrupt is to be a free man—free not only from debts, but from contracts, liabilities, engagements and contingencies of every kind. On the other hand, all the persons from whose claims and from liability to whom he is so freed, are to come in with the other creditors and share in the distribution of the assets (1). The present section of the British Act of 1914 is the same as section 31 of the Act of 1869,* with some minor exceptions. The section in the Presidency-towns Insolvency Act was based on the Act of 1869. Under earlier laws, there was a very small number of debts which could be proved in insolvency but there was a continuous tendency

(1) *Ex parte Llynvi Coal and Iron Company*, 1871, L. R. 7 Ch. 28, 31, per Sir W. M. James, L. J.

S. 34. to relax this rule. "The present wide powers of proof for damages arising out of a contract, promise or breach of trust were first established by the Act of 1869, which, like the present section, provided that all demands arising from contracts should be provable, however unliquidated or uncertain the amount of the claim, including, therefore, consequential damages, and damages, in cases where the amount has not been and even cannot be ascertained by fixed rules, and this whether the breach has or has not or could not have occurred before the discharge of the debtor; and in practice creditors seemed to have found no difficulty in swearing to the amount of their claims (1).

In sub-section (1) debts not provable in insolvency are described and in sub-section (2) debts which are provable have been described. In sub-section (2) also a limitation has been prescribed. Only those debts to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication are provable. Therefore debts not provable in insolvency come under the following three classes:—

1. Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated.

2. Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust.

3. Debts to which the debtor is not subject when he is adjudged an insolvent or to which he becomes subject before his discharge *not* by reason of any obligation incurred before the date of such adjudication.

To the above three classes a fourth one may be added. The section presumes that the debt is one which is legally recoverable in law as well as in equity. There may be cases where the debt may be recoverable in law in the absence of any insolvency but which on grounds of equity arising out of bankruptcy proceedings may not be recoverable. The fourth class will therefore embrace all debts which are not recoverable in law or in equity and are not provable in insolvency.

Debts which do not fall under any one of the four classes enumerated above are provable debts. It will be convenient to consider all debts, whether provable or unprovable under the above four headings, and determine as to which of them are provable and which of them are not.

Debts incapable of being fairly estimated.—The law applicable to the proof of contingent claims against a bankrupt's estate has been thus stated: "There is no doubt that a contingent claim for unliquidated damages is a provable debt, and its amount has to be estimated as at the date of the receiving order. That, however, does not mean that the effect of the receiving order is to accelerate the happening of the contingency so as to fix the amount of the claim on the basis of the contingency having happened on the day of the receiving order. The claim must be stated as on the day of the receiving order; if when the proof is lodged the contingency has not happened, the amount of the claim must be estimated as accurately as possible; if the contingency happens before

(1) William's Bankruptcy Practice, page 142.

the proof is lodged, that fact is *pro tanto* evidence of the true value of the claim as at the date of the receiving order, and there will, as a rule, be no difficulty in arriving at the amount of the claim; if the contingency happens after the proof is lodged, and it appears that the amount at which the damages have been estimated is below the true value, the creditor will be allowed to amend his proof or lodge a fresh proof at any time during the continuance of the bankruptcy, but not so as to disturb prior dividends" (1). S. 34.

1. Deferred dower of a Mohammadan wife.—The value of the deferred dower is incapable of being fairly estimated, as it is possible for it to become payable after a short or long period or perhaps never to become payable in the event of the wife predeceasing her husband and leaving no one (2).

2. Alimony.—Under the English Law, future payments of alimony to be made by a husband under an order of the court are incapable of valuation, and do not therefore constitute a provable debt, the husband remaining liable for them, notwithstanding bankruptcy (3). The reasons for the rule were thus stated :

"The power is given in consideration of the husband's ability to pay, irrespective of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions. That shows what this kind of alimony was intended to be by the legislature. A man's personal earnings after his bankruptcy do not go to his creditors. He keeps them himself notwithstanding his bankruptcy. He is as well able to pay alimony of this kind after his bankruptcy as before." For the same reasons arrears of alimony accruing due either before or after receiving order are also not provable (4). But a wife can prove in the bankruptcy of the husband for the value of an annuity under a covenant by her husband in his separation-deed, although she cannot maintain an action against her husband for arrears of the annuity accrued before or after the bankruptcy, notwithstanding that she has elected not to prove (5). In the case last cited the case of *Linton v. Linton* (6) was distinguished on the ground that there the claim was for alimony payable under an order of the divorce court.

Under the Indian law, a Hindu woman's claim for maintenance or residence has been held capable of valuation as much as an annuity which is admittedly provable in insolvency (7). The English case, *Linton v. Linton*, was distinguished on the ground that there the money was to be paid out of the personal earnings of her husband but under Hindu law it is the estate which is sought to be charged. This statement of the law needs, with respect it is submitted, qualification. Under Hindu law the liability to maintain is sometimes a personal obligation unconnected

(1) *Ellis & Co.'s Trustee v. Dixon-Johnson*, 1924, 1 Ch. 342, *per* P. O. Lawrence, J.

(2) *Mirza Ali v. Mst. Qadari Khanam*, A. I. R. 1919 Lah. 139 : 50 I. C. 774; *Sughra Bibi v. Gaya Parshad*, A. I. R. 1930 All. 589 (1) : 123 I. C. 754.

(3) *Linton v. Linton*, 15 Q. B. D. 239.

(4) *Kerr v. Kerr*, 1897, 2 Q. B. 439; *Re Hawkins*, 1894, 1 Q. B. 25.

(5) *Victor v. Victor*, 1912, 1 K. B. 247.

(6) 15 Q. B. D. 239.

(7) *Mst. Champa v. Official Receiver, Karachi*, A. I. R. 1933 Lah. 901 : 15 Lah. 9 : 149 I. C. 693.

- S. 34.** with property while it is in some cases a personal obligation only to the extent to which the person under obligation gets property. In the former case it would appear that the English rule should be followed while in the latter case the claim for maintenance will be provable in insolvency. A future claim for maintenance in the latter class of cases might, if the court so declares, be held not provable on the ground that it is incapable of valuation. For instance, a Hindu wife's claim for maintenance against her husband is enforceable only so long as she remains chaste. Nobody can say or possibly guess the time when that condition may cease to exist. The grounds on which a Mohammadan wife's claim for deferred dower has been held incapable of being properly estimated will equally apply to some cases arising under the Hindu law.

Where the liability for maintenance arises under an order made under S. 488 of the Code of Criminal Procedure, 1893, it is not yet decided as to whether the arrears of such maintenance and the future claim to it are provable in insolvency or not. Under section 44 an order of discharge does not release the insolvent from such a liability. From that, however, it will not follow that this liability is not provable. An order of discharge does not release the insolvent from debts due to the Crown also. Yet it is not disputed that it is open to the Crown to prove in insolvency (1). For deciding the point we must, therefore, examine the nature of the liability itself. Firstly, it may be remarked that the liability is a personal one and is presumably intended to be discharged out of the personal earnings of the debtor. On this ground the liability becomes, on the analogy of English law, unprovable in insolvency. Again, the liability to pay maintenance depends upon a number of contingencies and its amount can be varied by the criminal court. This argument makes the analogy to English law closer still. All that can be said for holding that arrears of maintenance can be proved in insolvency is that it has become an absolute liability and the debtor is personally responsible to pay for it. In other words, it becomes a debt in the real sense of the word.

3. Annuities—An annuity for life is capable of being fairly estimated and is therefore provable even though it be contingent on the performance or non-performance of some act by the payee himself (2). Where the annuity is payable to a wife under a covenant by a husband in a separation-deed, it is provable, even though the liability is determinable if she should not lead a chaste life, or if the husband and wife resume cohabitation (3).

4. Proof where debt is originally expressed in terms of foreign currency.—Where claims, sounding in debt or damages arising from a breach of contract or tort which were originally expressed in terms of a foreign currency, are sought to be enforced before the courts of this country, they must, before they can be comprised in an English judgment, be reduced to and expressed in sterling. The violent fluctuations in the relative values of currencies prevalent since the termination of the Great War have made the date at which the conversion must be made a

(1) S. 61 of the Act.

(2) *Ex p. Jackson*, 27 L. T. 696; *Exp. Blakemore*, 5 Ch. D. 372; *Exp. Neal*, 14 Ch. D. 579; *Exp. Naden*, 1887, L. R. Ch. App. 670; *Mst. Champa v. Official Receiver, Karachi*, A. I. R. 1933 Lah. 901 at page 905; 15 Lah. 9; 149 I. C. 693.

(3) *Exp. Neal*, 1880, 14 Ch. D. 579.

question of importance which has been before the courts in a number of cases (1). The following principles are deducible from the decided cases :— **S. 34.**

1. Where the claim is for breach of contract, the proper date for making the conversion is the date of the breach (2).

2. Where the claim is for damages arising from tort, the appropriate date is the date when the injury was sustained (3).

3. Where the claim is for a debt payable in this country but expressed in terms of a foreign currency the conversion from that currency to sterling must be made at the rate of exchange ruling on the date when the debt becomes due and payable.

4. Where the claim is for a debt payable abroad to a foreign creditor expressed in terms of the currency of the country in which the payment is to be made, the date of conversion is the date when payment was due (4).

Rents and covenants under a lease—The future and contingent liability of the assignee of a lease or a covenant to indemnify the lessee is provable, unless the lessee obtains an order of the court declaring the liability incapable of estimation (5). In *Hardy v. Fothergill* (6), a lease for a term of fifty years contained a covenant on the part of the lessee to repair and yield up the demised premises in repair at the end of the term. The lessee assigned the lease for the residue of the term and the assignee covenanted to perform all the covenants in the lease and to indemnify the assignor in respect of any breach of the covenants. Eight years before the term expired the assignee filed a petition of liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessee was not scheduled in the debtor's statement of affairs, and no notices were sent to him, and he tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired the lessor recovered damages against the lessee upon the covenants for repair. The lessee thereupon claimed an indemnity from the assignee in respect of his covenant to indemnify. It was held that the claim of the lessee was barred by the discharge of the assignee. The ground for the decision was that the contingent liability on the covenant to indemnify was a debt provable in the liquidation unless an order of the court declared it to be a liability incapable of being fairly estimated.

But the rule in *Hardy v. Fothergill* does not apply where the lessor is proving against the estate of the lessee in respect of an existing lease, in which case the lessor is not entitled to enter a claim for the whole of the rent and future obligations under the lease to the end of the term, but can only prove for the arrears of rent due to the breaches of covenant which have taken place up to the time of proof (7). If, however, the lessor

(1) Williams, page 144.

(2) *Re. British American Continental Bank, Ltd.*, Goldzieher and Penso's Claim, 1922, 2 Ch. 575; *Re British American Continental Bank, Ltd.*, *Re Lissner and Rosenkranz's claim*, 1923, 1 Ch. 276.

(3) *S. S. Celia (Owners) v. S. S. Voltorno (Owners)*, 1921, 2 A. C. 544.

(4) In *Re British American Continental Bank, Ltd.*, *Credit General Liegeois' Claim*, (1922) 2 Ch. 589.

(5) *Hardy v Fothergill*, 13 App. Cas. 351, decided under S. 31 of the Act of 1869.

(6) 1888, 13 App. Cas. 351.

(7) *Re New Oriental Bank Corporation*, (1895) 1 Ch. 753.

34. is willing to treat the lease as at an end, he will be entitled to prove in respect of all the obligations in future of the lessee under the lease. (1) The liability on a covenant for payment out of the estate of the covenantor after his death is provable in the bankruptcy of the covenantor (2).

Second class of cases.—They can be sub-divided into :—

1. Demands in the nature of unliquidated damages, which arise out of a contract or breach of trust ;
2. Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust.

All claims for damages arising out of contract, however difficult it may be to ascertain the exact amount, are provable in insolvency. Claims in respect of forward contracts or demands in the nature of unliquidated damages arising out of contract can be proved even though the due dates for the performance of the contracts have not arrived at the time of proof (3). Not only that, but as the amount of damages can be easily ascertained after the due dates have passed such a claim for damages can support a creditor's petition for insolvency (4). A covenant by a bankrupt to pay a sum of money at the request of A, and after his death at the request of the covenantee, with interest in the meanwhile creates a present provable debt to the covenantee if A concurs (5). There are however certain liabilities arising out of contract which have an object other than the payment of money or which can be met by an injunction or a decree for specific performance. It is not clear whether these liabilities are provable in insolvency (6). In *Hardy v. Fothergill* (7), the Earl of Selborne said : "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc., which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency ; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy."

Liability to pay calls on shares of a company purchased by a bankrupt is a liability which arises out of contract and is provable in insolvency.

An agent who brings about the relationship of buyer and seller is entitled to commission though the actual sale is carried out till after the insolvency of the seller, and he is entitled to prove for such commission (8). Damages for breach of a covenant to pay premiums entered into by the assured at the time of assigning a policy of insurance on his life are provable in insolvency (9).

(1) *Re Panther Lead Company*, (1896) 1 Ch. 978.

(2) *Barnett v. King*, (1891) 1 Ch. 4.

(3) In *re Moosaji Ismailji Lotia*, 15 I. C. 825.

(4) In the matter *Dholan Das*, A. I. R. 1919 Sind. 1 : 56 I. C. 158.

(5) *Exp. Stone*, L. R. 8 Ch. 914.

(6) Mulla, page 288.

(7) 1888, 13 App. Cas. 351, 360.

(8) *Re Beale*, 1888, 5 Morr. 37.

(9) See *Re Cumming*, 1929, B. & C. R. 4.

S. 34.

A breach of trust, although it would afford a good ground for an action in tort for unliquidated damages has been always, even without express enactment, held to create a debt in equity (1). Sometimes the distinction between a claim arising out of breach of contract and one arising out of breach of trust can be distinguished by a very fine line of demarcation only. For instance may be quoted the English cases of *Emma Silver Mining Company v. Grant* (2) and *Jack v. Kipping* (3). In the former case, a financial agent and promotor of the plaintiff company had secretly received from the vendors part of the purchase money of a mine, to acquire which the company was formed, and in an action to recover the amount so received, a specific sum was found due from him to the company. His affairs were then liquidated by arrangement, and he obtained his discharge. It was held that the company were entitled to prove in the liquidation for the sum so found, as not being a demand in the nature of unliquidated damages arising otherwise than by breach of contract, but that the debt having been incurred by fraud and breach of trust was not released by the order of discharge, and the defendant was therefore personally liable to pay to the company the whole debt, or so much thereof as had not been received under the liquidation. Jessel, M. R., considered that the sum was not in the nature of unliquidated damages at all, because it was a sum received by the defendant for which he was liable to account, and that it arose from a contract by reason of which he was liable to account for it. The second case was one of fraudulent misrepresentation on the sale of chattel; it was held that the damages for the false representation might be the subject of mutual credit, the false representation forming part of the contract. The scope of liabilities which arise out of breaches of trust is very wide and for cases one should go to the Indian Trusts Act and other similar enactments.

Again, there are certain liabilities which give rise to a claim for money, and which closely resemble contracts. S. 64, I. C. A., enacts that a party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. Accordingly it has been held that when a transfer by way of sale by the insolvent is annulled as fraudulent, but it is found that the alienee paid a sum of money towards the satisfaction of a prior decretal debt, the alienee may be allowed to prove in insolvency as an unsecured creditor to the extent of the prior debt discharged by him (4). Where a transfer by a Mohamaden husband in favour of his wife ostensibly for Rs. 25,000 in lieu of her dower debt was declared as fraudulent in the insolvency of the husband, it was held that it was open to the wife to prove the true amount of dower due to her (5). Reference may also be made in this connection to section 42, sub-section (2) Bankruptcy Act 1914, which deals with the avoidance of certain settlements but leaves unaffected the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy. Similarly in cases of contracts which are discovered to be void or which become void, any person who has received any advantage under such an agreement

(1) *Exp. Green*, 2 D. & C. 113; *Exp. Smith*, 2 M. D. & D. 113; *Exp. Westcott*, L. R. 9 Ch. 626; *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

(2) 17 Ch. D. 122

(3) 9 Q. B. D. 113, followed in *Filly v. Bowman, Ltd*, (1910) 1 K. B.

(4) *Amir Chand v. Manohar Lal*, 141 I. C. 343; A. I. R. 1933 Lah. 211.

(5) *Umrao Begam v. Ahmad Alikhan*, 20 I. C. 641.

S. 34. or contract is bound to restore it to the person from whom he had received.

Again, there are certain relations which resemble those created by contract. They are dealt with in sections 68 to 72 of the Indian Contract Act. Under section 68 a claim for necessities supplied to a person incapable of contracting on his own account can be realised from the property of such incapable person. It thus appears that in the bankruptcy of a person a claim for the value of supplies made to him while he was minor can be proved. Under S. 69, I. C. A., a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. The rule may be illustrated by a decided case. A purchased certain villages from the insolvent. One of the covenants of the transaction of sale was that if the vendor's title was found to be defective and thereby the vendee lost any of the properties purchased by him, the vendors would be liable to refund the proportionate value of such property; and to secure the liability the vendors specifically charged other three villages, Birgadiah, Birha and Bikhari. Subsequently the two last mentioned villages were sold by the insolvent to one Doctor Ganga Sahai. On a claim by the niece of the insolvent the vendee lost a one-eighth share in some of the villages which he had purchased. Thereupon the vendee made a claim by notice on Doctor Ganga Sahai as the purchaser of the villages charged with the liability for making good the loss sustained by him by reason of the claim of the insolvent's niece. Dr. Ganga Sahai complied with the demand and satisfied the charge which existed on the villages of Birha and Bikhari by payment of Rs. 10,000 to Seth Brij Behari Lal (the first purchaser). It was held that Ganga Sahai was interested in the payment of Rs. 10,000 to Seth Brij Behari Lal and that by virtue of section 69 it became a debt due from the insolvent and was therefore provable in insolvency (1).

Damages for tort.—Demands arising otherwise than by reason of a breach of contract or breach of trust are not provable in insolvency. But if the demand arises from a contract, it is none the less provable, because the action for the demand might properly be shaped in tort, *e. g.*, action against carriers, or action against bailees to recover the pledge after the determination of the bailment, which might be either in trover or assumpsit (2). In such cases a person has his election of two remedies, and may bring either trover or any other action, the possibility of his electing to bring an action in trover shall not prevent his proving his debt if he would waive the tort (3). The claimant, however, in such cases is put to his election between his remedies and he will be allowed to prove only if he waives the tort. Thus a patentee was held entitled to prove for the amount of profits made by an infringement of his patent as money had and received (4). A claim in tort ceases to be unliquidated if it has been settled by agreement or a decree has been obtained in respect of it before the date of adjudication. Thus in an English case proof was allowed for promissory notes given by way of compromise of an action for seduction (5). So damages awarded to a petitioner in a

(1) *Ganga Sahai v. Shiam Sunder Lal*, A. I. R. 1930 Oudh 266 : 127 I. C. 244.

(2) *Johnson v. Spiller*, (1779) Doug. 168, *per* Buller, J.

(3) *Parker v. Norton*, 6 T. R. 695, *per* Lord Kenyon.

(4) *Watson v. Holliday*, 20 Ch. D. 780.

(5) *Exp. Mumford*, 15 Ves. 289.

divorce suit in order to be paid into court have been held to be a provable debt though they would not support a bankruptcy petition (1). In an action of detinue, where the plaintiff had obtained a verdict for damages in default of the defendant returning the goods to him, and before he had issued execution, the defendant became bankrupt, it was held that the trustee in bankruptcy, being ready to give up the goods, the plaintiff could not prove as a creditor for the amount given by the verdict, since until execution should be issued the property in the goods remained in him (2). This matter is fully discussed under section 9 as well. S. 34.

Third class of cases.—It is provided by sub-section (2) that all debts to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication are provable debts. It means that if the debt was contracted before the order of adjudication, it should be subsisting and enforceable at law on the date of adjudication and if the liability to pay arises after the order of adjudication it must have arisen by reason of an obligation incurred before the date of such adjudication. The leading English case on the corresponding provision of the British Act is *Exp. Ross* (3). There it was held that in bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of bankruptcy. This case has been followed in subsequent cases (4). These cases were distinguished by the Court of Appeal in *re Benzon* (5); it was pointed out that the principle laid down in *Ex parte Ross* would apply only if the question arose in bankruptcy proceedings and not in any other proceedings. As a general rule the principle that once limitation begins to run, it continues to run will apply to proceedings other than insolvency proceedings.

The English case of *Ex parte Ross* has been followed in cases decided under the Indian law (6). In the Calcutta case *Baranashi Koer v. Bhabadeb Chatterjee*, Mukerji, J. said:—

“It is well settled that a debt barred by the statute of limitation is not provable in bankruptcy proceedings. But it is equally plain that the bar of time ceases to run (or to further run) after adjudication as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditor and all personal remedies against the bankrupt are also thereafter stayed. This principle is deducible from the provisions of the Provincial Insolvency Act, 1907, which make it impossible for a creditor to take proceedings in execution after the adjudication order has been made and during the pendency of the insolvency proceedings.”

(1) *Exp. Muirhead*, 2 Ch. D. 22; *Re A Debtor*, (1929), 2 Ch. 146.

(2) *Re Search*, L. R. 10 Ch. 234.

(3) 2 Gl. & L. 330.

(4) *Exp. Dewdney*, 15 Ves. 479; *Re Crosley*, 35 Ch. D. 266; *Exp. Lancaster Banking Corporation*, 10 Ch. D. 776, *per* Bacon, C. J.

(5) (1914) 2 Ch. 68.

(6) *Sivasubramania Pillai v. Theethiappa Pillai*, 75 I. C. 572; 47 Mad. 120; A. I. R. 1924 Mad. 163; *Baranashi Koer v. Bhabadeb Chatterjee*, A. I. R. 1921 Cal. 456; 66 I. C. 758; *Damodar Das v. Hamidul Rahman*, 98 I. C. 74; 2 Luck 261; A. I. R. 1926 Oudh 621.

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Now it may be taken as settled law that the point of time by reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of adjudication. If the recovery of the debt was not barred on the date of adjudication the debt is provable under the Act (1).

Accordingly it has been held that a debt contracted after the presentation of the petition and before the order of adjudication is provable in insolvency (2). And it has also been held that a debt incurred after adjudication is not provable under the Act (3). Where the liability arises after the order of adjudication, to make it provable it must be proved that it accrued by reason of an obligation incurred before adjudication (4). The above principle was applied in a Calcutta case (5), arising under the Act 3 of 1907 under somewhat unusual circumstances. The case illustrates the rigour of the rule. The facts in that case were as follows :—

After being adjudicated insolvents, the applicants proposed a scheme for composition which was rejected by the district judge. They subsequently represented to the court that majority of the creditors had accepted from them one half of their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in the court stating that they had been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sum due to them and prayed that on payment by them into the court of the said sums they should be permitted to prove their claims. On these facts it was held that in view of the provisions of sections 28 and 38 of Act, these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication.

Can a debt barred by time on the date of adjudication but subsisting on date of presentation of application be proved?—

The question was answered in the affirmative by a Division Bench of the Lahore High Court in *Nizam v. Babu Ram* (6). It was contended for the insolvent appellant that sub-section (7), S. 28, P. I. A., 1920, does not govern section 34 of the Act. The learned judges, in overruling this contention, made the following observations :—

“The learned counsel for the respondent rightly pointed out that the contention put forward by the learned counsel for the appellant, if

(1) *Syed Ijaz Hussain v. Lachman Das*, 75 I. C. 790 : A. I. R. 1924 Oudh 351.

(2) *Jamshedji Framji v. Pestonji*, 141 I. C. 466 : A. I. R. 1932 Bom. 511 ; *K. N. K. I. Chetty v. Ba Tin*, 61 I. C. 640 : A. I. R. 1919 L. B. 1.

(3) *Kallu v. Agha Salim*, 80 I. C. 923 : A. I. R. 1923 Oudh 668 ; *Kuer Beharil v. Kalka*, 67 I. C. 549 : A. I. R. 1922 Oudh 73 ; *Patri Venkata Srinivasa Rao v. Secretary of State*, A. I. R. 1935 Mad. 931 : 58 Mad. 1014 : 157 I. C. 1007.

(4) *Sisram v. Ram Chander Mal*, 126 I. C. 252 : 52 All. 439 : A. I. R. 1930 All 104 ; *Official Trustee of Bengal v. Kessin Gopal Behani*, A. I. R. 1930 Cal. 459 : 134 I. C. 91 : 57 Cal. 1210.

(5) *Beharilal Sikdar v. Harsukh Das Chakmal*, A. I. R. 1921 Cal. 376 ; 61 I. C. 904.

(6) A. I. R. 1933 Lah. 688 : 14 Lah. 730 ; 143 I. C. 175.

correct, would reduce the whole position to absurdity. For instance, a creditor's petition may become wholly infructuous, if the debtor succeeds in delaying the proceedings sufficiently long so that his debts become time-barred before the date of adjudication. When a creditor files a petition, he has to enter all his debts therein, and the question whether the debts are due and the debtor is able to pay them becomes "*sub-judice*" between the parties. Again, even according to the argument of the learned counsel for the appellant, sub-section (7). Section 28, at least governs the whole of that section. Now, sub-section (2) of that section lays down that, on the making of an order of adjudication the property of the insolvent vests in the court or the receiver and no creditor has any remedy against his property or can institute any suit or take other legal proceedings except with the leave of the court during the pendency of the proceedings. By virtue of sub-section (7), this vesting of the property and the consequent disability of the creditor to sue would seem to take effect from the date of the petition in cases wherein an adjudication order is granted. Consequently, even according to the argument of the learned counsel, it would seem logical to hold that the statute of limitation does not affect in such cases those debts which are within time on the date of the petition." S. 34.

According to this view, an order of adjudication should mean the date of the presentation of the petition for purposes of seeing whether a debt is provable in insolvency or not. If it be so, it at once follows that a debt contracted after the date of presentation of the petition and before the order of adjudication is not provable in insolvency.

This proposition has, however, not been accepted as correct in a Burma case (1). There a debt, contracted after the presentation of the petition and before the order of adjudication, was sought to be proved. The learned district judge held that the words "before the date of such adjudication" in section 28 (S. 34) should be taken to mean the date of presentation of the petition, having regard to the terms of S. 16, Sub-S. 60 (S. 28 (7), P. I. A., 1920.) which provides that an order of adjudication shall relate back to and take effect from the date of presentation of petition on which it is made. The Chief Court disagreed with the view and accepted the appeal. Their observations will bear quotation to show the other side of the argument.

The learned Judges remarked as follows :—

"In support of this view, it is pointed out that in other sections, e. g., sections 14 and 38, the term "date of the order of adjudication" is used, and we are asked to infer that the date of the adjudication must be a different date. We are unable to accept this view. The plain meaning of the term 'date of such adjudication' is the date on which the adjudication is actually made, and the provisions of section 16, clause (6) do not go so far as to require that any such adjudication should be antedated. Section 38 protects *bona fide* transactions up to the actual date of adjudication and it appears to us that such transactions are proveable under section 28. A comparison with the corresponding sections of the Presidency-towns Insolvency Act lends support to this construction. Section 46 of that Act contemplates that creditors can prove debts incurred after the presentation of the insolvency petition, and before the date of the adjudication, unless the creditor had notice of the presentation of the petition. The purpose of S. 16, Sub-S. (6), P. I. A., is the same as that of S. 51, P-t. I. A., namely, to

- S. 34. provide for the vesting of the insolvent's property in the receiver or assignee, as from the date of presentation of the petition, or other act of insolvency. We see no reason to hold that in case of the Provincial Insolvency Act, any more than in the case of the Presidency-town Insolvency Act, it was intended to debar creditors from proving debts not invalidated by other provisions of the Act."

The view of the Burma Chief Court finds support in a recent judgment of the Bombay High Court (1), though there no reference was made to the Burma ruling. There the question was as to whether a debt contracted after the date of the presentation of the petition and before the order of adjudication is proveable in insolvency or not ; and reliance was placed on the argument that section 34 (2) should be read with section 28 (7) of the Act. The contention was overruled and Rangnekar, J, defined the scope of section 28 (7) in the following words :—

"The section gives legislative sanction to the well-known doctrine of relation back and what it means is that the title of the receiver relates back to and commences at the date of the presentation of the petition on which the order of adjudication is made. The result of the application of the doctrine is merely this that the receiver is deemed to be the owner of the property from the date of the presentation of the petition, and as such he is entitled to impeach all dealings of the debtor even prior to the date of the adjudication unless the same are protected by section 55 of the Act. The further result is that the debtor cannot, after the date of his insolvency, that is, the date of the presentation of the petition, enter into any transaction in respect of his property which will bind the receiver. The next point is that the whole of section 28 deals with the question of the property of the insolvents and that is clear from the language of the section. It will thus be seen that the section has nothing to do with the debts provable in insolvency and that that subject is dealt with in section 34 (2)."

In a Madras Full Bench case it was assumed that the debt must not be time barred on the date of adjudication. The facts were : The insolvent owed the creditor money on a pronote and the last day of limitation for filing a suit was 20th October, 1928, which was a holiday. 21st October was also a holiday, and on 22nd October the debtor was adjudged insolvent. It was held that the debt was provable in insolvency as a suit could have been filed to recover it in the ordinary courts on 22nd October, (the date of the order of adjudication) by virtue of section 4, Indian Limitation Act (2). But the Lahore view has been followed, though not without much hesitation, by the Madras High Court in another later case (3). The Bombay High Court has also adopted the same view in a very recent case (4).

The above lengthy quotations have been given to enable the reader to judge for himself as to which view is correct. It is unfortunate that the Burma and the Bombay rulings were not cited before the learned judges of the High Court of Lahore. If the scope of section 28 (7) is not confined in the manner indicated in the Bombay ruling and if the words "date of order of adjudication" wherever they occur in the Act are to be antedated

(1) Jamshedji Framji v. Pestonji, 141 I. C. 466 : A. I. R. 1932 Bom. 511.

(2) Fatimabi v. Nagoorkhan, 65 Mad. 630 : 136 I. C. 822 : A. I. R. 1932 Mad. 287 (F. B.)

(3) Subramania Iyer v. Meenakshisundaram Chettiar, A. I. R. 1937 Mad. 577.

(4) Byramji Bomanji Talati v. Official Assignee, Bombay, A. I. R. 1936 Bom. 130 (English case-law discussed and relied upon).

so as to mean the date of the petition very startling results will follow. Again, it is very doubtful that the disability of the creditor to bring a suit under section 28 (2) arises from the date of the petition. If that were so, section 29 and section 78 will have to be read in a manner which, it is submitted, was never intended by the legislature. The amendment of section 53 by the legislature does not go against the Burma and Bombay view. Section 53 deals with transfers and the doctrine of relation back will apply by virtue of section 28 (7) even on the view of its scope taken in the Bombay ruling. As it is, the trend of decisions is in favour of the Lahore view, which may be taken to be the law at present.

S. 34.

Past and future claims for rent.—It is clear that arrears of rent which have become due before the order of adjudication are proveable in insolvency. Future claims for rent which accrue after the date of order of adjudication are provable only if they arise by reason of an obligation which the debtor incurred before the date of such order (1). In the Calcutta case no antecedent obligation was found as a fact. The obligation to pay rent is distinguishable from the obligation to pay the arrears of rent claimed. The arrears arose after the date of adjudication. The liability to rent was based on the previous contract of tenancy; but the obligation or liability to pay the arrears did not arise till after the adjudication was made. Arrears of rent so due stand on the same footing as rates, taxes, wages or salaries of servants which become payable after the order of adjudication (2).

It is provided by schedule 2, rule 22, Pt. I. A., that when any rent or other payment falls due at stated periods and the order of adjudication is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof upto the date of the order as if the rent or payment grew due from day to day. This rule is not contained in the Provincial Insolvency Act, but the same principle will apply.

Fourth class of cases.—The fourth class of cases embraces all debts which are not provable by the general policy of the law. The test is whether the debt could have been recovered in an action against the insolvent had he continued solvent. If the debt cannot be enforced by action it is not provable. These debts may be divided into the following classes :—

1. *Debts which are not enforceable under the general law.*

S. 23, I. C. A., declares void a contract the consideration or object of which is forbidden by law; or is of such a nature that, if permitted, it will defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or is regarded by the court as immoral or opposed to public policy. Under section 25, an agreement without consideration is void, subject to a few well-defined exceptions. Similarly the description of void agreements is to be found in Ss. 24 to 30, I. C. A. It is beyond the scope of this work to notice all the cases which have arisen under those sections. To the class of void

(1) *Official Trustee of Bengal v. Kissen Gopal Behani*, A. I. R. 1930 Cal. 459; 134 I. C. 91; 57 Cal. 1210; *Sundar Dass v. Official Receiver*, A. I. R. 1937 Lah. 790; See also *Kuer Beharilal v. Kalka*, A. I. R. 1922 Oudh 73; 67 I. C. 549.

(2) *Kuer Behari Lal v. Kalka*, A. I. R. 1922 Oudh 73; 67 I. C. 549.

- S. 34.** agreements mentioned in the Indian Contract Act may be added agreements which have been declared by special enactments to be unenforceable or which have been so declared by a court on general principles of law. By way of illustration, it may be mentioned that where a contract is entered into for perpetrating fraud and a fraud is actually carried out, no action in respect of it lies.

2. *Contracts against the policy of the bankruptcy laws.* An agreement by the debtor to pay money to a creditor to induce him not to oppose his discharge is illegal (1). A secret agreement to give preference to a creditor in a composition deed disables that creditor to prove even for his original debt which by the terms of the composition he has released. In such a case the release is absolute, but the condition, being tainted with illegality, is void (2). A liability arising out of an agreement which is in fraud of the other creditors is not provable (3). The holder of a bill which in its initiation was a fraud on the bankruptcy law and the holder knew or ought to have known when he took it that such was the fact cannot prove (4).

3. *A debt barred by limitation cannot be proved* (5).

Other miscellaneous liabilities considered.—(a) *Costs*—The law as to proving for costs was stated in *Re British Goldfields of West Africa* (6), in the following terms:—"If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise.....If the action against a person who becomes bankrupt is unsuccessful, no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then if he is ordered to pay the costs, or if a verdict is given against him, before he becomes bankrupt, they are provable. On the other hand, if no verdict is given against him and no order made for payment of costs until after he becomes bankrupt they are not provable. In such a case there is no provable debt to which the costs are incident and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy" (7).

(1) *Kearley v. Thomson*, (1890) 24 Q. B. D. 742; *Naoroji v. Kazi Sidick Mirza*, (1896) 20 Bom. 636.

(2) *Ex parte Oliver*, (1850) 4 DeG. and Sm. 357; 64 E. R. 866; *Ex parte Phillips*, (1888) 36 W. R. 567.

(3) *Re Myers*, (1908) 1 K. B. 941.

(4) *Jones v. Gordon*, 2 App. Cas. 616, on appeal from *Re Gomersall*, 1 Ch. D. 137.

(5) *Ex parte Dewdney*, (1808) 15 Ves. 479 : 33 E. R. 836 : 149 R. R. 670; *Ex parte Roffey*, (1815) 19 Ves. 468 : 34 E. R. 590 : 2 Rose. 245; *Baranashi Koer v. Bhabadab Chatterjee*, 66 I. C. 758 : A. I. R. 1921 Cal. 456; *Gustasp Behram v. Bhagwandass*, 134 I. C. 1161 : A. I. R. 1931 Bom. 554 : 55 Bom. 649. (Costs of an application for leave by a non-creditor to sue the official assignee under an order passed after adjudication of the mortgagor are not provable).

(6) (1889) 2 Ch. 7.

(7) See also *Marreddi Seshireddi v. Official Receiver, Guntur*, A. I. R. 1937 Mad. 725.

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Where a remand order passed before the order of adjudication provides that the costs of the first trial should abide the event of the new trial and the judgment is pronounced after the new trial after the order of adjudication, the costs of the first trial are not provable in insolvency, by reason of any obligation incurred before the order of adjudication (1). An order on an interlocutory application making the costs of it costs in the action does not give rise to a provable debt. The trustee may require satisfactory evidence that the claim for costs is genuine even though the bankrupt may have covenanted to pay the amount. A person entitled to enforce against the bankrupt payment of any costs by process of contempt can prove for the amount payable under the process, subject to ascertaining the amount by taxation (2). Costs under an award delivered before bankruptcy are provable.

In a suit for partition brought by the younger brother of the debtor against the debtor and A, the debtor was adjudged insolvent during the pendency of the partition suit and after his adjudication the decree in the partition suit was passed against the defendants with costs. A then filed a suit against the official receiver in insolvency claiming half the amount of costs which he had paid. It was contended on behalf of the defendant that the suit could not lie as leave was not obtained from the court to file the suit. It was held that the suit being one for partition, the debtor was under no obligation, contingent or otherwise, towards A before the decree in the partition suit. The obligation arose when the order for costs was made in the decree in the partition suit subsequent to the adjudication of the debtor as insolvent. The amount of costs was not, therefore, a debt provable in insolvency. No leave of the court to file the suit for recovery of half share of such costs was necessary before the institution of the suit as required by section 28 (2) of the Act (3).

(b) A creditor became a party to, and was a trustee under, an assignment for the benefit of creditors which contained a release. Afterwards, a receiving order was made against the assignor on a petition presented by a creditor, who refused to sign the deed, founded on the execution of the deed as an act of bankruptcy. It was held that the creditor was entitled to prove in the bankruptcy, on the ground that the intention was that the deed was not to operate in case of bankruptcy, and that the release was to hold good only in case the consideration for which it was given should hold good (4).

(c) Where in an action against trustees for a breach of trust a sum is certified to be due from the defendants to the plaintiff, and the plaintiff accepts a payment from one of the trustees by way of compromise in respect of his liability, such acceptance does not discharge the other trustees *pro tanto*, and the plaintiff may prove in the bankruptcy of that other for the full amount certified without giving credit for the payment under the compromise (6).

(d) A debt arising upon a voluntary bond may be proved for equally with debts for valuable consideration, unless steps have been

(1) *Re a Debtor*, 1911, 2 K. B. 652.

(2) Williams, page 147.

(3) *Marreddi Seshireddi v. Official Receiver, Guntur*, A. I. R. 1937 Mad. 725.

(4) *Re Stephenson*, 20 Q. B. D. 540.

(5) *Edwards v. Hood—Barrs*, (1905) 1 Ch. 20.

S. 35. taken by the official assignee or receiver to set it aside as fraudulent against creditors (1).

(e) A debt due from a deceased can be proved in the insolvency of the deceased's legal representatives in whose hands his properties have passed (2). In a Nagpore case (3) an opinion has been expressed that the words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself. The actual case was decided on another point. It is difficult to reconcile this opinion with what has been held in the Madras case cited above.

(f) The true owner of goods entrusted to the bankrupt for sale and in his possession at the commencement of bankruptcy in such circumstances that they pass to the trustee under the reputed ownership section has been held by the Court of Appeal to be entitled to prove for the value of the goods (4). The ground of the decision was, shortly, that the bankrupt's suffering an act which prevented him from fulfilling the obligations imposed on him by the contract of bailment was a breach of that contract.

(g) A debt which arises out of a contract which by the law of the country where the contract was made could not be enforced against creditors may nevertheless be provable in England, since, in such a case, it is not the existence of the debt, but only the remedy, which is in question, and that must be determined by the law of the country where the bankruptcy takes place (5).

(h) It is the debt due in equity which is in all cases provable. Thus in the case of bonds, it has always been held, that it is the debt due in equity which is provable, and not the penalty (6). So, in the case of contracts containing a penalty clause, only the actual damage sustained can be the subject of proof (7).

Annulment of Adjudication.

35. Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the

(1) *Re Coates*, (1892) 9 Morr. 87.
 (2) *Official Receiver, Tinnevely v. Krishna Pillai*, A. I. R. 1935 Mad. 1058 : 159 I. C. 88.
 (3) *Keshoram v. Govind Ram*, A. I. R. 1923 Nag. 142 : 68 I. C. 240.
 (4) *Re Button*, (1907) 2 K. B. 180.
 (5) *Exp. Melbourne*, L. R. 6 Ch. 64.
 (6) *Exp. Maclean*, 2 M. D. & D. 564 ; *Exp. Fidgeon*, 4 Dea, 217.
 (7) *Exp. Cappers*, 4 Ch. D. 724.

provisions of sub-section (2) of section 10, not entitled **S. 35.** to present such petition.

History.—The section reproduces section 42 (1) of the Act of 1907. The words beginning from “and the court may”—till the end of the section were added by section 5 of the Provincial Insolvency (Amendment) Act, XI of 1927. The reasons for this amendment have been fully stated in commentary under section 10. The words “or where a composition or scheme has been approved by the court under section 27,” which occurred in the old section have been omitted in the present section, the reason being that the present Act has made different provisions in regard to compositions and arrangements from those existing in the old Act.

Analogous law.—The corresponding provision, S. 21, P-t. I. A., runs as follows :—

“21. (1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the court may, on the application of any person interested, by order annul the adjudication and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition.

“(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.”

This section is, except for some minor verbal alterations, is a reproduction of sections 35 (1) and 36, B. A., 1883, and sections 29 (1), 4, B. A., 1914. The most important difference between the wording of the present section and the section of the Presidency towns Insolvency and British Bankruptcy Acts is that under the former Act the court has no discretion to refuse to annul an adjudication if the conditions laid down in the section are complied with. Under the latter Acts the court has that jurisdiction. Sub-section (2) of S. 21, P-t. I. A., is not reproduced in the Provincial Insolvency Act, but the same principles, it seems, will apply to cases under the Provincial Insolvency Act.

Scope.—This is the first of the series of sections which deal with the annulment of adjudication of insolvency. It presupposes that there has been an order of adjudication. Where, therefore, the application for insolvency was dismissed under section 25 (1), no question of annulment arises and there can be no order of annulment under section 35 (1). The section provides that the court shall annul an adjudication of insolvency if any *one* of the following conditions is satisfied : —

1. where in the opinion of the court a debtor ought not to have been adjudged insolvent ;

(1) *Bali Ram v. Supadasa*, 121 I. C. 55 : A. I. R. 1931 Nag. 109.

S. 35. 2. where it is proved to the satisfaction of the court that the debts of the insolvent have been paid in full ; or

3. where the adjudication was made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10, not entitled to present such petition.

If any one of the above conditions is established, the court *shall* annul the adjudication. It is in regard to the power of the court to refuse an annulment that the Provincial Insolvency Act mainly differs from the Presidency-towns Insolvency Act.

Where the debtor ought not to have been adjudged insolvent.—

The occasions for exercising the power of annulling the adjudication under the Provincial Insolvency Act on the ground that it ought not to have been made appear to be even more restricted than under the Presidency-towns Insolvency Act. The provisions and procedure of the Provincial Insolvency Act are different from those of the Presidency-towns Insolvency Act and dealing with such questions under the Provincial Insolvency Act, the Privy Council case of *Chhatrapat Singh Dugar v. Kharag Singh Lachhmi Ram* (1) should be borne in mind. It cannot, therefore, be said within the meaning of the section that a person ought not to have been adjudged insolvent where the petitioner had fulfilled all the conditions required by the Act to enable him to present a petition (2). Thus the grounds for annulling an adjudication and for refusing an order of adjudication are the same. If the court acts under this section for reasons that would not have prevailed under section 15 for refusing the adjudication, then an order annulling the adjudication for the same reasons must be bad (3). We have seen already as to when an order of adjudication must or must not be made. The same principles will apply when an application for annulling the adjudication is made.

An order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-section (1) of S. 42, P. I. A., 1907. The section is moulded on section 25 of Statute 45 and 46, Vict, Chap. 52; with reference to the latter provision, it has been ruled that the court has no power to annul otherwise than in exercise of the authority vested in it by statute (4).

We proceed to note some cases :—

1. Where the order of adjudication was accompanied by directions to the debtor who was a public officer that he should deposit into court Rs. 25 a month, failure to comply with the condition is not a ground for annulling adjudication because the condition annexed thereto was

(1) A. I. R. 1916 P. C. 64 : 44 Cal. 535 : 44 I. A. 11.

(2) *Alamelumangthayarammal v. T. S. Baluswami Chetty*, A. I. R. 1928 Mad. 394 : 108 I. C. 208.

(3) *Beharilal Sahu v. Juthar Mal*, A. I. R. 1916 Patna 181 : 38 I. C. 822 ; *Shera v. Ganga Ram*, 37 I. C. 214 : A. I. R. 1917 Lah. 112.

(4) *In re Gyll*, *Ex parte* Board of Trade, 1888, 5 Mor. 272 ; *Re Dixon and Cardes*, 5 Mor. 291 ; *In re Hester*, 1889, 22 Q. B. D. 632 ; *In re Painter*, 1805, 1 Q. B. D. 85. It may be incidentally noted that a contrary view had been taken and wider powers claimed for the court under the statute of 1869 by Bacon, C. J., in the case of *Ex parte Ashworth*, *In re Hoare*, 1874, 18 Eq. 705.

imposed without jurisdiction and was therefore not binding on the insolvent. **S. 35.**

2. Omission to make a true statement as to property is not a ground for refusing adjudication or for annulling adjudication once made (1).

3. Absence of available assets is no ground either for refusing an order of adjudication of an insolvent or for annulling the adjudication once made (2).

4. An order adjudicating a person insolvent cannot be annulled for failure to deposit costs of publication under section 30 (3).

5. The facts that the debtor was found to be dishonest in his dealings, and that he was entering recklessly into transactions or incurring debts which he never hoped to pay do not furnish grounds for dismissing an insolvency petition and are consequently no legal grounds for annulling adjudication (4).

6. The facts that the insolvent's conduct has been dishonourable or dishonest or fraudulent or that he is a scoundrel and does not deserve the assistance of the court are not sufficient grounds for annulling an order of adjudication (5).

7. The fact that the receiver of the insolvent's property has been unable to satisfy the debts nor the fact that the opposing creditor is proved to have at one time consented to a composition nor even the consent of all the creditors is a sufficient ground to annul an adjudication when the conditions of the section are not complied with (6).

Annulment on equitable grounds.—We have discussed at length under section 10 the question as to whether a court under the Provincial Insolvency Act can refuse to pass an order of adjudication on the ground of abuse of process of court, even though the other conditions laid down in section 10 are satisfied. There we came to the conclusion that so far as the Provincial Insolvency Act is concerned the law has been settled by the Privy Council and that such a ground is no longer available for courts in the mufassil to dismiss an insolvency petition. We have also seen that there are authorities in support of the view that under the Presidency-towns Insolvency Act a court can refuse an order of adjudication and can also annul one, if once made, on such a ground (7).

A debtor ought not to have been adjudged insolvent where the conditions required by section 9 were not satisfied or fulfilled at the time of making the order of adjudication. Thus the court can, under section 35,

(1) *Behari Lal Sahu v. Juthermall*, A. I. R. 1916 Patna 181 : 38 I. C. 822.

(2) *Shera v. Ganga Ram*, A. I. R. 1917 Lah. 112 : 37 I. C. 214.

(3) *Har Kishore v. Masum Ali Khan*, A. I. R. 1930 Oudh 53 : 124 I. C. 368 : 5 Luck. 479.

(4) *Mohan Lal v. Madhaya Prasad*, 53 All. 476 : 131 I. C. 35 : A. I. R. 1931 All. 331.

(5) *Alamelumangathayarammal v. Baluswami Chetti*, 108 I. C. 208 : A. I. R. 1928 Mad. 394.

(6) *Moti Lal v. Ganpat Ram*, 34 I. C. 792 : A. I. R. 1916 Cal. 178 (2).

(7) *Malchand v. Gapal Chand Ghosal*, 39 I. C. 199 : 44 Cal. 899 : A. I. R. 1917 Cal. 117 ; *In re Ballav Chand Serowgie*, 27 C. W. N. 739 : A. I. R. 1923 Cal. 703 : 80 I. C. 651.

S. 35. inquire as to whether the debt due to the petitioning creditor amounted to Rs. 500 or not. And for that purpose the court is entitled to go behind a judgment where there is evidence that the judgment had been obtained by fraud or collusion or that there had been some miscarriage of justice (1). For this also see section 33 and notes thereunder. In an enquiry for annulment of adjudication, the court can go into other grounds for adjudication which were not mentioned in the original petition which led to the adjudication but which existed on that date. If they are proved, at the subsequent enquiry, the court can hold that on the date of the filing of the application the debtor ought to have been adjudged insolvent and refuse to annul the adjudication under S. 21, P. I. A. (S. 35, P. I. A.) (2). Again, it can be shown that the act of insolvency on which the order was based did not really exist (3), or that the debtor could not be adjudged insolvent, such as that he was a minor (4).

Payment in full.—The expression 'payment in full' means actual payment of debts in full; and the word 'debt' includes subsequent interest upto the date of payment at the contract rate (5). Such payment must be in cash in full satisfaction of the claims and the insolvent cannot escape the result of the adjudicating order and prevent the court from enquiring fully into his affairs by adjusting his claims and getting the creditors to accept less than what they considered due to them, nor by thus getting a receipt in full can he contend that as his debts have been paid in full the adjudication order should be annulled. That can only be done by a composition or scheme of arrangement under the Act. Full discharge of debts by payment of four annas in the rupee is not a full payment within the section and does not entitle the insolvent for an order annulling the order of adjudication (6). Where a friend of the bankrupt bought up all the debts for less than 2 shillings in the pound, and then assigned them at their full value to a third person on the bankrupt's behalf it was held that the debts were not paid in full, and the bankruptcy could not be annulled (7). Unconditional releases of debts are not equivalent to payments in full; and, to bring the case within the section, all debts which have been actually and properly proved in the bankruptcy must be paid in full (8). Where it is admitted that the debts of the insolvent have not been paid in full but it is stated that all his creditors gave him a complete and full discharge, that admission is not enough for the annulment of adjudication

(1) Hashim Khan v. Koya Moideen Kaka, 145 I. C. 835 : A. I. R. 1933 Rang. 268 ; M. Koya Mohideen Kaka v. Hashim Khan, A. I. R. 1935 Rang. 276 : 158 I. C. 333.

(2) Sooniram v. S. A. R. M. Chettyar Firm, 12 Rang. 64 : 149 I. C. 723 : A. I. R. 1933 Rang. 363, per Biguley, J. ; See also *In re Hester*, 22 Q. B. D. 632 and *In re Keet*, 2 K. B. 666.

(3) Karuthan Chettiar v. Raman Chetty, 97 I. C. 590 : A. I. R. 1926 Mad. 1159 (2).

(4) Jag Mohan Narain v. Girish Babu, 42 All. 515 : 58 I. C. 557 : A. I. R. 1920 All. 210.

(5) Muhammad Ibrahim v. Ramchandra, 48 All. 272 : 92 I. C. 514 : A. I. R. 1926 All. 289 ; A. A. Halles, *in re*, 60 I. C. 943 : 47 Cal. 914.

(6) Brij Kessor Lal v. Official Assignee of Madras, 43 Mad. 71 : 52 I. C. 79 : A. I. R. 1920 Mad. 219.

(7) *Re Burnett*, 1 Mans. 89.

(8) *In re Keet*, 1903, 2 K. B. 666 ; *In re Subrati Jan Mahomed*, A. I. R. 1914 Bom. 188 : 1914, 38 Bom. 200 : 20 I. C. 859 ; *Nazukrao v. Jai vantrao*, 18 N. L. J. 145,

under section 35 (1). But in order to make the payment in full it is not necessary that such payment should have been made through the official receiver (2). S. 3

Annulment of adjudication made on petition barred under section 10 (2).—This provision was introduced by Act 11 of 1927 and we have, under section 10, traced the history of the circumstances which led to the amendment. It is to be observed that the word used in the newly added portion of the section is "may" and not "shall". The annulment in such a case, therefore, seems to be discretionary with the court. Prior to the amendment applications, which would now be barred under the section, were dismissed on the ground of abuse of the process of court under the Presidency-towns and the Provincial Insolvency Acts; but this power is taken away under the Provincial Insolvency Act by the Privy Council.

Who can apply under the section.—The court can exercise this power only when the matter is properly before it. It is only when an appeal against the order of adjudication has been made under section 75 (1) or when an application is made by a person interested under section 35 that the court has authority to annul or set aside an order of adjudication (3). In a case the insolvent got himself fraudulently and collusively adjudicated by setting up a bogus creditor. Later on the original creditor who had sued to enforce his claim dropped out and another bogus creditor who stepped in to continue the proceedings put proof of his claim before the official receiver. The same having been rejected, he appealed to the District Judge who, however, dismissed his appeal and at the same time annulled the adjudication. Thereupon, another creditor applied under O. 40, R. 1, C. P. C., to review the said order but it was also rejected. It was held that the District Judge acted wrongly in annulling the adjudication in the absence of a prayer to that effect by either party, and that the same constituted an error apparent on the face of the record so as to sustain an application for review (4).

Under the first part of the section the application may be made by the debtor or any other person interested. The expression "any other person interested" is used in the section to give the court power to act in nearly all cases where the interests of any person are affected. Under the second part of the section, which was added in 1927, the court may act of its own motion or on an application made by the receiver or any creditor. Where the application is not made by the receiver or any creditor but by another person and the court acts upon it, it is submitted, that the annulment will be considered as having been made by the court of its own motion.

Consent of creditors.—Under the Act of 1869, the court had only to consider whether in fact all the creditors had consented to the annulment and desired it. But now the law is different. Now the court is to consider all the circumstances of the case and the mere fact that all the

(1) Kottapali Bapayya v. Official Receiver, Guntur, 124 I. C. 134 : A. I. R. 1930 Mad. 112 (1).

(2) Velayudham Pillai v. The Official Receiver of Tinnevely, 52 I. C. 689: A. I. R. 1920 Mad. 890 (1).

(3) Periammal v. Official Receiver of Coimbatore, 1930 M. W. N. 651.

(4) Venkatappavva v. Punnavva 1932 M W N 152 (F R)

S. 35. creditors consent will not entitle the debtor to have his adjudication annulled (1). In the case of *In re Hester* (2), Lord Esher, M. R., said :—

“The cases are clear that the court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the court may still consider whether what they have agreed to is for the benefit of the creditors as a whole. The court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors but also whether it is conducive or detrimental to commercial morality or to the interests of the public at large” Fry, L. J., added : “It is an idle notion that the court is bound by the consent of the creditors. The court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding order. We are bound, in the exercise of our jurisdiction in such a matter, and I think, in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country.”

Consequences of annulment.—The consequences of annulment under the section are dealt with under section 37. It is doubted whether an annulment of adjudication will *ipso facto* put an end to the insolvency proceedings in all cases (3).

Notice to debtor.—Action under section 35 can ordinarily be taken on an application made by the official receiver or by the creditors and on proof of circumstances specified in that section but the attention of the insolvent must be drawn to the facts alleged against him by notice or advice so that he may be able to meet them (4). In a case of annulment of adjudication under section 43, P. I. A., it was however held by the Full Bench of the Patna High Court that there is no provision for issuing a fresh notice upon the insolvent calling upon him to show cause why the adjudication should not be annulled (5).

Limitation.—An objection to the application for annulment was not made till after the lapse of a considerable time, having been raised for the first time in appeal, it was held that there can be no bar of limitation in the matter, but an objection taken at a very late stage should not be entertained (6).

Appeal.—An appeal lies under section 75 (2), Schedule 1, against an order annulling adjudication.

(1) *Re Flatau*, (1893) 2 Q. B. 219.

(2) (1889) 22 Q. B. D. 632 ; see also *Moti Lall v. Ganpat Ram*, 21 C.W.N. 936 : A. I. R. 1916 Cal. 178 (2) : 34 I. C. 792.

(3) *Ponnuswami Chettiar v. Kalliaperumal Naicker*, 113 I. C. 550 : A. I. R. 1929 Mad. 480.

(4) *Dola Ram v. Parmanand Mopchand*, A. I. R. 1932 Lah. 659.

(5) *Gopal Ram v. Magni Ram*, 107 I. C. 830 : 7 Pat. 375 : A. I. R. 1928 Pat. 338 (F. B.).

(6) *Harish Chandar Mukherjee v. The East India Coal Company, Limited*, 1912, 16 Cal. W. N. 733 : 14 I. C. 576.

36. If, in any case in which an order of adjudication has been made, it shall be proved **S. 36.**

Power to cancel one of concurrent orders of adjudication.

to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon.

History.—This is section 17 of the Act III of 1907.

Analogous law.—The corresponding section, section 22, Presidency-towns Insolvency Act, runs as follows :—

“Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the suing debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.”

The difference between the two Acts is that under the Provincial Insolvency Act, the court may annul an adjudication if insolvency proceedings are pending in another court in British India. But under the Presidency-towns Insolvency Act, a court may do the same even if the insolvency proceedings are pending in any British court without British India.

In England the difficulty does not arise because cases can be transferred from one court to another (1).

Concurrent proceedings and orders of adjudication.—A debtor may be adjudged insolvent by two or more courts. Section 11 defines the jurisdiction of courts and from that section it is clear that more than one court may have jurisdiction over the same debtor. For instance, the debtor may be ordinarily residing in district A and he may be carrying on business in district B ; both the district courts of A and B are competent to entertain an insolvency petition in respect of him. This possibility of concurrent proceedings is likely to lead to friction, conflict of jurisdiction and inconvenience in some cases. The section is enacted to avoid such friction, conflict of jurisdiction or inconvenience (2). That insolvency proceedings pending in one court are not a bar to the entertainment of similar proceedings by another court was clearly recognised by Their Lordships of the Privy Council in *S. K. Banerjee v. Harsukhdas* (3).

Applicability.—In order that the section may apply three conditions should be satisfied :—

(a) The insolvency proceedings should be pending in another court ;

(1) In the matter of William Watson, (1904) 31 Cal. 761, 772.

(2) *Siri Dhar Chowdhury v. Magni Ram*, 3 Pat. 357 : 78 I. C. 620 : A. I. R. 1924 Pat. 791.

(3) *S. K. Banerji v. Harsukhdas*, 104 I. C. 1 : A. I. R. 1927 D. C. 123 : 21

- S. 36.** (b) the property of the debtor can be more conveniently distributed by such other court; and
 (c) the insolvency proceedings relate to the same debtor.

We have already considered the meaning of the words "another court." The second condition is that a court will annul its order of adjudication only if the insolvent's property can be more conveniently distributed by such other court. The convenience of distribution has been made the real test. As regards the third condition, it has been held by the Madras High Court, in a case under section 22, Presidency-towns Insolvency Act, 1909, that the court has no power to annul the adjudication order on the ground of convenience unless the *same* debtor or debtors have been adjudged as insolvents in more than one court. An adjudication against A and B in one court and against A only in another court is not against the same debtor (1).

Power to annul or stay the proceedings discretionary.—The section says that the court may annul or stay proceedings, thus leaving the matter to the discretion of the court to which an application is made under the section. The leading case is *S. K. Banerjee v. Harsukh Das* (2). In that case on the 6th August, 1924, the appellant was adjudicated an insolvent by the court of Birbhum. On the 15th September the respondent firm filed a petition in the High Court of Calcutta on the original side in insolvency jurisdiction, making a claim to money. On the 17th March, 1925, the High Court in its insolvency jurisdiction treated itself as having jurisdiction and made an order adjudicating the appellant insolvent. The appellant objected that having regard to section 22 it was wrong to make the order that was made at Calcutta. It was suspected that the proceeding at Birbhum were not proceedings which were in the interest of the creditors and that it was better that the jurisdiction should be exercised by the Calcutta High Court, and accordingly the High Court Judge exercised the jurisdiction, and on appeal to the court of appeal, the view taken by him was affirmed. In dismissing the appeal Their Lordships adopted the opinion of the Court of Appeal which was expressed in the following words :—

"The learned judge had authority in his discretion, notwithstanding the previous adjudication in Birbhum, to make an adjudication here, and that he exercised a discretion in making such an order, which is not a discretion which should be interfered with by a court of appeal. After all, it was open to any party who so desired, notwithstanding the fact that an adjudication order had been made, on proper materials to satisfy the court that the proceedings in Calcutta should be stayed having regard to the insolvency proceedings that were going on in the court at Birbhum. The result is that there is no substance in this appeal or in the argument by which it is sought to support the appeal."

In a Bombay case, decided under section 9, Indian Insolvent Act, a debtor was adjudged insolvent by the Madras High Court and an application was made in Bombay at the instance of the Bombay creditor. It was held that the Bombay Court had jurisdiction to make the order but had discretion to refuse it if, having regard to all the circumstances of the case, it considered that the adjudication at Bombay would be useless. The

(1) *The Official Assignee of Madras v. The Official Assignee of Rangoon*, A. I. R. 1924 Mad. 662 : 83 I. C. 174.

(2) A. I. R. 1927 P. C. 162 : 104 I. C. 1 (section 22, Pt. I A. 1909)

actual decision was that the Bombay proceedings were stayed leaving the Bombay creditors to take such steps in Madras as they thought proper. As the proceedings in Madras were prior in time and the assets of the insolvent were vested in the official assignee there, the court at Bombay yielded to the prior claim of the court at Madras (1). In another Calcutta case a debtor had been adjudged bankrupt in England and in Calcutta as well; it was held that the insolvency court in India has jurisdiction to pass an order of adjudication notwithstanding a prior adjudication order in England, provided the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary. The presence of large assets within the jurisdiction of those courts is a strong circumstance in favour of such an order, but the question is one of discretion depending upon considerations of convenience, justice and equity. (2). In another Madras case, the first insolvency was in the Madras High Court and the second insolvency was in the Rangoon High Court. The Official Assignee of Madras was unable to recover the assets of the insolvent, but a good part of the assets was realised by the Official Assignee at Rangoon. Upon these and other facts the High Court of Madras annulled the adjudication before it, leaving it to the Madras creditors to prove against the estate of the insolvent in the Rangoon High Court (3). In a Lahore case the proceedings were allowed to continue in two courts. Insolvency proceedings were started at Rawalpindi and subsequently at Delhi at the instance of the debtor and the Delhi creditors respectively. The Delhi creditors of the debtor had not only to realise a much larger sum than the Rawalpindi creditors, but had also to contest an alienation made by him. The Rawalpindi creditors agreed to accept part payment of their debts out of the sale proceeds of the debtors' property situated at Rawalpindi. It was held that, having regard to the peculiar circumstances of the case, it was proper to allow the proceedings to continue in both the courts leaving it to them to decide ultimately which of them should annul the order of adjudication that it might make (4).

Stay of proceedings under section 18-A, Presidency-towns Insolvency Act.—Section 18-A (1) runs as follows :—

The Court may, at any time after the presentation of an insolvency petition, stay any insolvency proceedings pending against the debtor in any	Court subject to the superintendence of the Court, and may, at any time after the making of an order of adjudication, annul an adjudication against the debtor made by any such Court."
Control over insolvency proceedings in subordinate Courts.	

This section gives the High Court in the exercise of its insolvency jurisdiction power to stay insolvency proceedings pending against the debtor in any court subject to the superintendence of the court, and at any time after making an order of adjudication to annul an adjudication against the debtor made by any such court. This section was added by Act 10 of 1930. Prior to the amendment, it was held by the Calcutta and the Bombay High Courts that the insolvency judge of the High Court had no such power under the Presidency-towns Insolvency

(1) In *re Arangayal Sabhapathy Moodliar*, 21 Bom. 257.

(2) In the matter of *William Watson*, 31 Cal. 761 : 8 C. W. N. 553.

(3) *Official Assignee of Madras v. Official Assignee of Rangoon*, (1919) 42 Mad. 121 : 49 I. C. 210 : A. I. R. 1919 Mad. 566.

(4) *Kedar Nath v. Dwarka Das*, 109 I. C. 648 : A. I. R. 1928 Lah. 848.

S. 37. Act, or the Letters Patent or any other provision of law (1). It was also held that S. 22, Pt. I. A., 1909, enables the court to stay its own proceedings and not to order some other court to stay its proceedings.

There is no provision which authorises the High Court in its insolvency jurisdiction to stay proceedings in courts not subject to its superintendence. To such cases S. 22, Pt. I. A., 1909, or S. 36, P. I. A., 1920, might be applied in a proper case and the court will almost invariably set aside a subsequent order of adjudication passed under the Presidency-towns Insolvency Act if there has been a prior adjudication by a Provincial court not subject to its superintendence, even though the act of insolvency relied on by the petitioning creditor under the Presidency-towns Insolvency Act was prior in time to the adjudication order of the Provincial Court (2). The reason is that the adjudication order which is prior in time vests the property of the insolvent regardless of the doctrine of relation back (3).

Effect of annulment under section 36.—See section 37 which provides for cases when adjudication is annulled under sections 35 and 36.

37. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the local official Gazette and in such other manner as may be prescribed.

History.—The section reproduces section 42, sub-sections (2) and (3) of the Act III of 1907. There it occurred as a part of section 42, the sub-section (1) of which corresponded to section 35. Section 36 of the present Act reproduces in substance section 17 of the old Act. Section 37, by virtue of its position in the Act, now applies to the cases of annulment under section 36 as well. Under the old Act too, it seems, that it applied though it was not so clear.

Analogous law.—The section corresponds to section 23 (1) (3), P-t. I. A., section 29, sub-sections (2) and (3), B. A., 1914, and sections 35 (2) and (3), B. A., 1883.

(1) *Sarat Chandra Pal v. Barlow and Co.*, A. I. R. 1928 Cal. 782 F. B. : 56 Cal. 712 : 113 I. C. 860 ; *In re Manik Chand Virchand*, 47 Bom. 275 : 75 I. C. 61 : A. I. R. 1922 Bom. 390 ; *Naginlal Maganlal v. Jai Chand*, 49 Bom. 788 : 91 I. C. 160 : A. I. R. 1925 Bom. 543.

(2) *Malik Ram Lall v. Official Assignee of Calcutta*, A. I. R. 1933 Cal. 1161 : 141 I. C. 863.

(3) *Ram Lall v. Official Assignee of Calcutta* *supra* ; *Official Assignee of Madras v. Official Assignee of Rangoon*, A. I. R. 1919 Mad. 566 : 49 I. C. 210 : 42 Mad. 121.

General effect of annulment.—The section states the general effect of annulment. When an adjudication is annulled, subject to the conditions stated in the section, the debtor is remitted to his original situation. In the leading case, under the English section 81 of the Act of 1869 (which corresponds to the present section 29 (2)), *Bailey v. Johnson* (1) Cockburn, C. J., said :—

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“The effect of section 81 of the present Act is, subject to any *bona fide* disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation.”

Where no appointment was made by the court and no condition was imposed it would seem that the property would revert to the insolvent unconditionally (2) and the official receiver has, in such a case no authority to prosecute an application under section 53 (3), or otherwise deal with the insolvent's property (4). When an adjudication is annulled under section 43, the insolvency proceedings automatically come to an end except so far as they are kept alive by orders passed under the section. Such acts in the insolvency as have not been completed at the annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the court directs their continuance (5).

The original situation to which the debtor shall be remitted on annulment will be that which existed on the date of the order of adjudication. A judgment-debtor was declared insolvent by the Court for the Relief of Insolvent Debtors, Madras, and the vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditors' trust-deed was executed, of which the plaintiffs were the trustees. They then sued to set aside the proceedings of execution. It was held that the attachment operated as from the date of its first issue because the effect of the proviso to section 9 of the Insolvency Act was to re-vest the insolvent's property in him as from the date of the vesting order, subject, however, to all acts done by the assignee, or under his authority (6). In another Madras case the facts were just the opposite. There two persons applied at Madras to be declared insolvents and an order was made whereby all their properties vested in the official assignee. They then entered into a deed of composition for the benefit of their creditors, four persons being appointed trustees under the deed. The insolvent's petition was subsequently dismissed on its being represented to the court that the creditors had agreed to the deed of composition and one of the

(1) L. R. 7 Ex. 263.

(2) *Shakar Khan v. Ishardas*, A. I. R. 1936 Lah. 568.

(3) *Maung Hme v. U. Po. Seik*, 86 I. C. 324: 3 Rang. 201: A. I. R. 1925 Rang. 301; *Chouth Mal Bhagirath v. Jokhi Ram Suraj Mal*, A. I. R. 1933 Pat. 84: 12 Pat. 163: 141 I. C. 836.

(4) *C. A. V. Baluswami Naidu v. Official Receiver, Madura*, A. I. R. 1936 Mad. 915: 165 I. C. 207.

(5) *Bhadramma v. Prarvatasam Ayyavaru*, 139 I. C. 574 (2): A. I. R. 1932 Mad. 731.

(6) *Ramasami Kottadiar v. Murugesu Mudali*, 20 Mad. 452.

- S. 37.** creditors then attached the insolvent's property. In support of the creditor's right to do this it was contended (in a suit brought by one of the trustees under the deed against the creditor) that inasmuch as the deed of composition had been executed after the vesting order and prior to the dismissal of the insolvent's petition, it was inoperative to transfer the property comprised in the deed to the trustees, and that it could not, in consequence, prevail against the attachment. It was held that the provision in section 7 of the Insolvent Act that, in case, after the making of the vesting order, the petition should be dismissed, the vesting order shall become null and void, had the effect of revesting the property in the insolvent retrospectively from the date of the vesting order. Independently, therefore, of section 43 of the Transfer of Property Act the composition deed operated to vest the property in the trustees and the creditor had no right to attach it (1). When an adjudication order is annulled it is as though it had never been made, with certain exceptions. The acts of the receiver and of the court duly done are allowed to stand and subject to that the property vests in the bankrupt retrospectively, that is to say, as it was at the time when the adjudication order was first made (2).

On annulment the property of the debtor reverts to him. Thus a suit instituted by the receiver of the estate of an insolvent against a debtor of the insolvent can be continued on annulment of the order of adjudication by the insolvent himself. The reason is that the right to sue which had vested in the receiver on adjudication is revested in the insolvent on annulment (3). The word 'property' as used in section 37 does not, however, include the right to sue for cancellation of a transfer which had accrued to the official assignee. This right to sue is a personal right and cannot be subject of transfer. Being a personal right specially granted by law it cannot be an interest that devolves under O. 22, r. 10, C. P. C. Therefore, where an official assignee has become *functus officio* on account of the property of the insolvent having been vested in the trustees under section 38 in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a certain court, and the court dismisses it under order 9, rule 8, C. P. C., the trustees cannot apply to be made the legal representatives of the official assignee and ask for the restoration of the suit (4). Moneys representing dividends declared but not paid, become the property of the creditors on allocation and do not revert in the insolvent under the section (5).

Sales, dispositions of property, payments and acts done before annulment.—The section expressly provides that the order of annulment shall not affect the validity of sales, payments etc., and all transactions generally done by the court or receiver before such annulment. Thus where the debtor's property has been sold prior to such annulment in

(1) Kothandaram Rayuth v. Murugesu Mudaliar, 27 Mad. 7.

(2) Lakshminchandra Jhavar v. Bepin Behari Ghose, 115 I. C. 356 : A. I. R. 1923 Cal. 644.

(3) Mannulal v. Nelin Kumar Mukerji, 41 All. 200 : 16 A. L. J. 938 : 48 I. C. 443 : A. I. R. 1918 All. 21 (2).

(4) Ch. Sajjan Mal v. Bodh Raj Ram Kishan Mal, A. I. R. 1934 Pesh. 89 : 152 I. C. 380.

(5) Sidick Haji Husein v. Official Assignee of Bombay, 59 Bom. 600 : 157 I. C. 930 : A. I. R. 1935 Bom. 310.

execution of a decree against him, the property so sold does not revert to the debtor or to the receiver appointed under section 37. They are entitled to the sale proceeds only (1). If during the continuance of the bankruptcy the trustee takes no steps to enforce the claim which consequently becomes barred by the statute of limitation, such claim will continue to be barred if the bankruptcy is annulled (2). The rejection of a proof by the trustee holds good after annulment, and the claim so rejected cannot be enforced (3). S. 37

After the order of annulment the court has however no jurisdiction to pass any order affecting the property of a person other than the debtor. Thus so long as the order of annulment is in force the court has no jurisdiction to reopen the distribution of dividends at the instance of a creditor and to demand a refund of money from the other creditors to whom a dividend has been distributed. The remedy of the creditor lies in challenging the order of annulment of adjudication and so long as that order is unchallenged he has no remedy in the insolvency court (4). Section 37 is intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent. Until the alienation is found bad the property belongs to the alienee and there cannot be an order vesting the property in the creditor (5).

The unconditional annulment of the adjudication pending a creditor's application to set aside a sale of the insolvent's property by the official receiver does not deprive the insolvency court of its jurisdiction to hear and determine the application. The effect of section 37 is that the order of annulment will not invalidate the acts of the court or of the official receiver theretofore done; but they do not acquire a degree of sacrosanctity or immunity from attack by way of appeal which they would not have possessed had there been no order of annulment (6). Nor the annulment will have the effect of giving the insolvent any rights in his property which he had not had before his insolvency. Thus a property, a transfer of which has been avoided by the receiver under section 53 or section 54, will not, after annulment, vest in the insolvent as his property because the property reverts to him to the extent of his right or interest therein only. His interest was nil in the property before the insolvency, and he gets no interest on its annulment (7). Similarly, where after the adjudication of two partners as insolvents, the firm assigned a mortgage debt due to it in favour of a third party and the adjudication was subsequently annulled, the result of the annulment was to re-vest the property in the firm

(1) *Jokhiram Surajmal v. Chowthmal Bhagirath*, A. I. R. 1931 Pat. 70 : 9 Pat. 945 : 130 I. C. 38.

(2) *Markwick v. Hardingham*, 15 Ch. D. 339.

(3) *Brandon v. McHenry*, 1891, 1 Q. B. 438, decided on like words in section 81 of the Act of 1869; *J. N. Mundra v. V. Nemsai Rajpal and Co.*, A. I. R. 1935 Nag. 246.

(4) *J. N. Mundra v. Nemsai Rajpal & Co.*, A. I. R. 1935 Nag. 246 *supra*.

(5) *Selvam Chettiar v. Venkatachalam Chettiar*, 129 I. C. 36 : A. I. R. 1931 Mad. 10 (this case has been disapproved in subsequent cases).

(6) *Subbarayadu v. Official Receiver, Cuddappah*, 156 I. C. 284 (2) : A. I. R. 1935 Mad. 433.

(7) *R. V. Banerjee, Official Receiver v. D. Succaram*, 158 I. C. 651 : A. I. R. 1935 Rang. 328 : 8 R. R. 208.

S. 37. and the assignment was binding on those members whose insolvency was annulled (1).

Shall vest in such person as the court may appoint.—At the time of annulling an adjudication the court may order that the property of the debtor, instead of reverting to the debtor, shall vest in any person appointed by the court. This is a useful provision and enables the court to retain control of the insolvent and his property even after annulment. The provisions of section 37 apply when the adjudication is annulled under section 43 (1) on failure of the debtor to apply for an order of discharge within the period specified by the court. Under section 43 it has no option but to annul the adjudication, but with a view to protect the creditors, the court should pass an order under section 37 vesting the property of the debtor in a person appointed by it (2). The right to collect the money due to the insolvent (*e. g.* decrees in his favour) is property within the section and it vests in the appointee who can execute them after annulment (3).

Powers of appointee.—An adjudication can be annulled under four sections of the Act. Firstly, under section 35 when the debtor ought not to have been adjudged or when his debts have been paid in full. Secondly, under section 36 when insolvency proceedings are pending in more than one court. Thirdly, under section 39 when the court approves a proposal or scheme of arrangement. Fourthly, under section 43 when the debtor fails to apply for discharge. In all these cases the provisions of section 37 have been made applicable. When the adjudication is annulled under section 35, 36 or 43, the powers of the persons appointed by the court under section 37 stand on the same footing. As regards the powers of the appointee under section 39 on approval of a composition scheme, there is a difference of opinion. The High Courts are not agreed as to whether an appointee under section 39 and an appointee under the other sections referred to have exactly the same powers in dealing with the vested property or not.

Allied to the above question is the effect of an order under section 37 on insolvency proceedings. That is to say, the question has arisen as to whether the joint effect of annulment of adjudication and a vesting order in a third person is to terminate the insolvency proceedings or to continue them in the same way as if there had been no annulment for dealing with the property so vested or to continue them in another form subject to the directions of the court annulling the adjudication only. In regard to both these points three positions have been taken in the decided cases. The first position is that the appointee holds the property for the benefit of the insolvent and no one else. It was so decided by the Madras High Court in a case (4), since overruled by a Full Bench of the

(1) *Ma Thwe v. Munshi Ram*, 131 I. C. 62 : A. I. R. 1931 Rang. 191 ; *Bhyrabewanhalli Vingappa v. Official Receiver, Bellary*, A. I. R. 1937 Mad. 717.

(2) *Roop Narain v. King & Co.*, 94 I. C. 234 : A. I. R. 1926 Lah. 370 ; *Shopidan Lachmi Narain v. Bahadur Chand*, 100 I. C. 137 : A. I. R. 1927 Lah. 914.

(3) *R. V. Banerjee, Official Receiver v. D. Succaram*, A. I. R. 1935 Rang. 328 : 158 I. C. 651.

(4) *Arunagiri Mudaliar v. Official Receiver*, 98 I. C. 1060 : A. I. R. 1926 J. 175.

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same High Court reported in A. I. R. 1935 Mad. 826 (1). The second position is that the appointee holds the property only to make it available to the creditors to take their remedy under the ordinary civil law. According to this position it is not open to the insolvency court to proceed to sell the property so vested and to proceed to distribute the assets of the insolvent among any of the creditors. This view was adopted by the Allahabad High Court in *Panna Lal v. Official Receiver* (2) and by the Rangoon High Court in the undermentioned cases (3). The view taken in these decisions is that the vesting order is primarily to prevent the debtor after annulment of the adjudication from disposing of his properties, for placing them beyond the reach of his creditors, and that the creditors should be in a position to proceed according to the general civil law against the properties vested in the appointee as trustee. An alienation made by the debtor of property so vested is wholly ineffective. On this view, by annulling the insolvency the court comes to the conclusion that it will not proceed with the insolvency and such an order should not be extended so as to give the creditors all the privileges conferred on them by the special provisions of the Insolvency Act. Distribution of assets is a proceeding in insolvency and it cannot continue after annulment. The third view is that the appointee has full power to sell the property or distribute it among creditors. This view has been adopted by the Lahore (4), Madras (5) and Calcutta High Courts (6). The matter was discussed at length by the learned judges of the Madras High Court in *Jethaji's* case (7). There the learned judges relied *inter alia* upon English cases of annulment on approval of a composition scheme and held that the same principles can be applied to a case when the adjudication is annulled under section 43 and a vesting order is made under section 37. The following two questions were afterwards referred to a Full Bench of the Madras High Court :—

(1) *Moturi Veerayya v. P. V. Sreenivasa Rao*, A. I. R. 1935 Mad. 826 : 158 I. C. 1030 : 58 Mad. 903.

(2) 53 All. 313 : 134 I. C. 148 : 1931 A. L. J. 18 : A. I. R. 1931 All. 71 ; *Pannalal Sham Lal v. Abdullah Usman*, 143 I. C. 330 : 1932 A. L. J. 1035 : A. I. R. 1933 All. 117.

(3) *Jaing Bir Singh v. The Official Receiver*, 11 Rang. 257 : A. I. R. 1933 Rang. 223 : 145 I. C. 320 ; *Maung Po Gyi v. R. K. Banerjee*, 156 I. C. 783 : A. I. R. 1935 Rang. 152 ; *Annamalay Chettyar v. R. K. Banerjee*, A. I. R. 1936 Rang. 284 (F. B.) : 14 Rang. 254 : 163 I. C. 217 ; *I. S. Seema v. R. K. Banerjee*, A. I. R. 1933 Rang. 338 : 164 I. C. 412 (an appointee is neither a necessary nor a proper party to a suit brought in respect of a debt provable in insolvency after annulment).

(4) *Roop Narain v. King & Co.*, 94 I. C. 234 : A. I. R. 1926 Lah. 370 ; *Bagie Ram v. Chanan Mal*, 108 I. C. 633 : A. I. R. 1923 Lah. 453 ; *Asanand v. Jugal Kishore*, A. I. R. 1933 Lah. 1005 : 147 I. C. 778 ; *Kidar Nath v. Ibrahim*, A. I. R. 1934 Lah. 394 : 150 I. C. 74.

(5) *Jethaji Peraji Firm v. Krishnaya*, A. I. R. 1930 Mad. 278 : 52 Mad. 648 : 122 I. C. 351 ; *Somasundaram v. Peria Karuppan*, 126 I. C. 621 : A. I. R. 1930 Mad. 520 ; *Selvam Chettiar v. Venkatachalam Chettiar*, A. I. R. 1931 Mad. 10 : 129 I. C. 36 ; *Moturi Verrayya v. P. V. Srinivasa Rao*, 58 Mad. 908 : A. I. R. 1935 Mad. 823 F. B. : 158 I. C. 1030 ; *Yeruva Chinnappa Reddy v. P. V. Srinivasa Rao*, A. I. R. 1935 Mad. 835 : 59 Mad. 62 : 151 I. C. 917 ; *Srinivasa Rao v. Secretary of State*, A. I. R. 1935 Mad. 931 : 157 I. C. 1007 : 58 Mad. 1014.

(6) *In re Keshablal Dhar*, A. I. R. 1933 Cal. 336 : 144 I. C. 214 : 60 Cal. 259.

(7) A. I. R. 1930 Mad. 278 : 52 Mad. 648 : 122 I. C. 351

S. 37. 1. Where the insolvency court annuls an adjudication under section 43, Provincial Insolvency Act, 19 0, and chooses to pass an order under section 37 vesting the properties of the quondam insolvent in an appointee (official receiver or any other person), is the administration in insolvency to continue for the realisation or distribution of the assets by such a person, despite the annulment of the adjudication itself?

2. If not, what is the scope of his functions as a trustee by reason of the vesting order under section 37?

The judgment of the Full Bench was delivered by Justice King. He adopted an intermediate view that the appointee continues to be subject to the directions of the insolvency court which appointed him, that these directions relate to the property of the insolvent, and that they should be given in accordance with the policy and provisions of the Insolvency Act. On the one hand, he refused to adopt the view that an annulment is equivalent to a complete cessation of all insolvency proceedings. On the other hand, continuance of proceedings under section 37 was in his opinion not equivalent to the actual continuation of the insolvency proceedings. Against the view that annulment is equivalent to a complete cessation of all insolvency proceedings, he said :—

“In the first place such an interpretation seems to us clearly against the principle underlying the provisions of section 43 itself. It is obvious that the only reason for the annulment under that section is the conduct of the insolvent himself, and from sub-section (2) of that section that its primary object is to punish the insolvent by depriving him of any protection which he may hitherto have been enjoying under the insolvency law. Why should the negligence of the insolvent have the necessary effect of upsetting the rights of his creditors *inter se*, for if this first view is to be upheld, those creditors cannot any longer expect the fair and equal treatment which had been assured to them by the insolvency. Those who have got no decree will be hopelessly handicapped against those who may proceed immediately to execution, and those who were aware of the annulment will have no advantage over those who are not.....The first point to be noticed is the antithesis between the vesting order and the reversion of the debtor's property to himself. Now it is true that under the first view according to which the appointee is a trustee or custodian of the debtor's property, the debtor's freedom to dispose of it as he wishes after the annulment is restricted, but in every other respect the legal effect of the vesting order will not be different from the legal effect of the reversion of the property to the debtor. Surely this can never have been intended.” As to the view that after annulment the proceedings continue for all purposes the learned judge remarked :—

“The fact that not only the official receiver but any other person may be appointed in section 37 is against the view that an order under section 37 continues the insolvency proceedings for all purposes. The person appointed under section 37 has no longer by the mere fact of his appointment, the powers which a receiver has under the Act. He has only such powers, as are necessarily implied by the vesting order which are, as we understand them, to carry out the directions of the court and those directions, as we have said, should, so far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act. To this extent then we would answer the first question in the affirmative.” The second question was answered on the presumption that the person appointed under section 37

is the official receiver, who was receiver under the Act before the annulment. It was held that an application under sections 53 and 54, if pending at the time of annulment, can be continued by the appointee under section 37 but that he has no authority to initiate new proceedings under those sections after annulment. The reason stated is that the making of the application under sections 53 and 54 is an act of the receiver and is unaffected by the annulment. Thus it has been held that an appointee can apply to the court for reducing or expunging the proof of a creditor (1); and the appointee can even pay a debt which was not provable in insolvency, *i. e.*, a debt incurred after the annulment of adjudication and if the debt is a Crown debt it shall be paid out of the assets in the hands of the appointee in priority to all other debts (2).

The reasons which have been adduced against the view adopted by the Madras Full Bench were stated with much force by the learned Chief Justice of the Rangoon High Court in the Rangoon Full Bench case cited above.

Much can be said for either view. The point is not free from difficulty. The language in which sections 43 and 37 of the Act are couched is neither clear nor free from difficulty. It is desirable that the legislature should settle the conflict at an early date, as the matter is one of general importance and of frequent occurrence in courts of law.

Appointee's power to continue proceedings pending under sections 53 and 54 of the Act.—The above conflict of opinion has arisen on account of two points. The first is as to whether the appointee can proceed to sell and distribute the proceeds amongst the creditors of the insolvent whose adjudication has been annulled. The second point is: Can such an appointee continue proceedings pending on the date of annulment under sections 53 and 54? As regards the latter point it has been held by the Madras High Court (3) that the appointee can continue such proceedings, when the property in dispute is vested in him by the order of the court under section 37. The contrary was held by a Full Bench of the Rangoon High Court (4). Where the application under section 53 or section 54 was dismissed and the insolvency was annulled afterwards, it was held that insolvency ceased to exist and no appeal from the order of dismissal was competent (5).

Annulment on approval of composition under section 39.—Under section 38 it is open to a debtor to submit a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs for consideration of the court and it is provided by section 39 that if the court approves the proposal, the order of adjudication

(1) *P. V. Srinivasa Rao Pantulu v. Yeruva Chinnapa Reddy*, A. I. R. 1936 Mad. 125 : 165 I. C. 205.

(2) *Srinivasa Rao v. Secretary of State for India*, 58 Mad. 1014 : 157 I. C. 1047 : A. I. R. 1935 Mad. 931.

(3) *Jethaji Peraji Firm v. Krishnayya*, A. I. R. 1930 Mad. 278 : 52 Mad. 648 ; 122 I. C. 351 ; *Moturi Veerayya v. P. V. Sreenivasa Rao*, A. I. R. 1935 Mad. 826 F. B. : 158 I. C. 1060 : 58 Mad. 908.

(4) *Jaing Bir Singh v. R. K. Banerjee*, A. I. R. 1933 Rang. 223, Full Bench : 11 Rang. 287 : 145 I. C. 320.

(5) *Kidarnath v. Mohammed Ibrahim*, 150 I. C. 74 : A. I. R. 1934 Lah. 394.

- S. 37.** shall be annulled and the provisions of section 37 shall apply (1). The law as to the applicability of section 37 to cases of annulment on approval of composition has been thus stated by Williams :—

“Although in cases where the annulment is on the ground that the adjudication ought never to have been made the court will in all respects try to remit the bankrupt to his original position, yet, in cases where the annulment is, as it is under section 21 after the court has approved a scheme of composition, a continuance of the bankruptcy in another form, the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the court in respect of that estate will remain as they were under the bankruptcy (2). In a case, *West v. Baker* (3), the question arose whether in a suit by a person, in whom the bankrupt's estate was vested under section 81 of the Act of 1869, the defendant could plead a set off for unliquidated damages which would have been provable had the proceedings in bankruptcy continued ; in giving effect to the plea, it was observed that the annulment of bankruptcy does not take the matter out of the Bankruptcy Act so as to prevent the general rules of bankruptcy applying. In the same case Pollock, B., said :—

“Before this Act there were two modes of proceeding open ; either to go on under the bankruptcy, or to annul the proceedings altogether. Now, however, there is an intermediate course by which the control of the court is retained and the annulling of the bankruptcy only means that there shall be no adjudication of bankruptcy in the ordinary way but the proceeding shall be moulded and the terms of the composition enforced under the direction of the court.

In *Ex parte Lennard* (4) the facts were these : A composition scheme provided for the annulment of the bankruptcy and the assignment by the debtor of all his personal property to the trustee to secure the composition. The scheme having been approved and the bankruptcy annulled, a question arose whether the rights of an execution creditor under an execution that was void in the bankruptcy revived upon the annulment. The registrar granted an injunction restraining the creditors from proceeding with their execution. It was contended that the court had no jurisdiction, the bankruptcy having been annulled. The Court of Appeal overruled the objection. James, L. J., observed :—

“I am of opinion that under sections 28 and 72, Bankruptcy Act, 1889, the court of bankruptcy has jurisdiction to determine all questions which may arise in the case of a scheme of arrangement..... But here, though the bankruptcy has been annulled, the composition was made in bankruptcy by the court itself as a part of the scheme which was approved by the court..... The order was therefore made in what continued to be a matter of bankruptcy and the question was a question to be decided under section 72 for the purpose of making a complete distribution of the property.”

The rule of English law has been followed in India in cases arising under the Act. Thus it has been held in India that an annulment on

(1) *Bank of Chettinad v. Saw Yu Bhan*, 160 I. C. 861 : A. I. R. 1935 Rang. 498.

(2) *William's Bankruptcy Practice*, page 139, 14th edition.

(3) (1875) 1 Ex. D. 44 : 45 L. J. Ex. 913 : 24 W. R. 277 : 34 L. T. 102.

(4) (1875) 45 L. J. B. K. 49 : 1 Ch. D. 177 : 24 W. R. 182 : 33 L. J. 553,

approval of composition schemes does not put an end to insolvency proceedings and the court retains control of the debtor's property and may pass all orders necessary for giving effect to the scheme (1). It is doubtful whether the proceedings continue under section 39 on account of the special provisions relating to compositions and schemes of arrangement or on account of the fact that section 37 has been made applicable to an annulment under section 39. It must be remembered that, besides declaring that the provisions of section 37 shall apply, section 39 directs that the court shall frame a schedule in accordance with the provisions of section 33 and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any of the debts entered therein. If any default is made in the payment of any instalment due in pursuance of the composition or scheme or if it appears to the court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the court was obtained by fraud, the debtor may be re-adjudged an insolvent, annulling the composition or scheme, *vide* section 40. In the face of these sections, it is a point for consideration whether in case of an annulment of adjudication on approving a composition, the continuance of the proceedings by way of framing a schedule and distribution of assets among the creditors as *per* the composition scheme is in accordance with the special provision of section 39 rather than as a necessary consequence of the vesting order under section 37 (2). That cases decided under section 39 are no guide for determining the effect of an annulment under section 43, to which also section 37 applies, has been held in the Full Bench case of the Rangoon High Court (3). There it was said that an annulment after approval by the court of a scheme of composition stands upon a different footing from an annulment on other grounds, and that there are special provisions in the Act regulating the jurisdiction of the court in connection with carrying out the schemes of composition which have been approved by the court. This opinion has, however, not been accepted as correct by a Full Bench of the Madras High Court (4), who followed an earlier decision (2) of their own court on the same point.

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Order under section 37 can be passed even after the order of annulment.—It is not correct to say that after the order of annulment the insolvency proceedings come to an end *ipso facto*. Though the effect of passing an order of annulment without any condition is to vest the property in the debtor, there is nothing in the Insolvency Act to prevent the court *subsequently* from giving suitable directions or vesting the property in the receiver for the protection of the creditors. Such an order is not a review of the order of annulment but is supplementary to it, and can be passed under S. 151, C. P. C., attracted by section 5 (1) of the Pro-

(1) *K. Timmappa v. Devasiharpal*, 115 I. C. 815 : 29 M. L. W. 23 : 1929 M. W. N. 22 : A. I. R. 1929 Mad. 157; *Mothuram Doulat Ram v. Pahlajrai Gopal Das*, A. I. R. 1925 Sind 159 : 80 I. C. 286.

(2) *Moturi Veerayya v. P. V. Sreenivasa Rao*, A. I. R. 1935 Mad. 826 : 158 I. C. 1060 : 58 Mad. 908, *per* Sundaram Chetty, J., the referring judge.

(3) *Jaing Bir Singh v. R. K. Banerji*, A. I. R. 1933 Rang. 223 : 11 Rang. 287.

(4) A. I. R. 1935 Mad. 826 *supra*.

(5) *Somasundaram Chettiar v. Pariakaruppan Chettiar*, A. I. R. 1930 Mad. 520 : 126 I. C. 621.

- S. 38. vincial Insolvency Act (1). No doubt if subsequent to annulment and before the vesting order the insolvent has transferred the property to a *bona fide* purchaser, such a purchaser perhaps may not be affected. But the parties to the insolvency proceedings will be bound by the order (2).

Appeal — An appeal lies from an order passed under section 37 of the Act (3).

Compositions and Schemes of Arrangement.

38 (1) Where a debtor after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides

(1) Chouthmal Bhagirath v. Jokhiram Surajmal, 12 Pat. 163 : 141 I. C. 836 : A. I. R. 1933 Pat. 84; Ishardas v. Mt. Fatima Bibi, 15 Lah. 698 : 153 I. C. 993 : A. I. R. 1934 Lah. 468; Abdul Latif v. Percival, Receiver, A. I. R. 1936 Cal. 573 : 166 I. C. 509. (It was decided also on the ground that annulment of adjudication does not terminate insolvency proceedings).

(2) Chouthmal Bhagirath v. Jokhiram Suraj Mal, 12 Pat. 163 : 14 I. C. 836 : A. I. R. 1933 Pat. 84.

(3) Shop-Idan Lachminarain v. Bahadur Chand, 100 I. C. 137 : A. I. R. 1927 Lah. 914.

reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate. **S. 38.**

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case, the Court may either approve or refuse to approve the proposal.

History.—Section 38 corresponds to section 27, clauses 1, 2, 3, 4, 5, 6 and 9 of the Act III of 1907, except that in clause 1 the words ‘whether before or’ have been omitted. The words “by publication in the local official Gazette” have also not been reproduced in the present section. The effect of the first change is that whereas under the old Act compositions and schemes of arrangement could be submitted even before the order of adjudication, now under the present section this can be done only after an order of adjudication has been passed against the debtor. The effect of the second change is to leave the manner of issuing notice to the creditors in the absolute discretion of the court as determined by rules framed under section 79 of the Act. The Act III of 1907 in allowing for compositions before the date of adjudication followed the English law on the subject, but, its scheme being essentially different from that of the English Act, the provision was found in actual practice ineffective. Accordingly it was held that a composition scheme before adjudication though not barred was impossible to give effect to and the court should have exercised its discretion in rejecting it (1). Clauses 1, 2, 3, 4, 5, 6 and 9 of the old Act correspond to clauses 1, 2, 3, 4, 5, 7 and 6 of the present section respectively. Under the present Act, a composition scheme can be filed in court only after an order of adjudication is made and not before. Hence a composition scheme filed before the order of adjudication cannot be put into operation after the order of adjudication is passed (2).

Analogous Law.—Under the English law an order of adjudication is preceded by the passing of a receiving order. Compositions and schemes of arrangement can be considered after the passing of the receiving order and before the order of adjudication as well as after the order of adjudication. The relevant provisions are contained in sections 16 and 21 of the Bankruptcy Act, 1934. They are as follows :—

“16. (1) Where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and setting out particulars of any sureties or securities proposed.

(1) *In re Application of Assomal*, 9 I. C. 724; *Shaw v. Shadi Ram*, 32 I. C. 565; A. I. R. 1916 Sind. 73.

(2) *Brojendra Nath (thos v. Satish Chandra Das*, 145 I. C. 185; 37 C. W. N. 189; A. I. R. 1933 Cal. 495 (2).

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"(2) In such case the official receiver shall hold a meeting of creditors, before the public examination of the debtor is concluded, and send to each creditor, before the meeting, a copy of the debtor's proposal with a report thereon; and if at that meeting a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors, and when approved by the court shall be binding on all the creditors.

"(3) The debtor may at the meeting amend the terms of his proposal, if the amendment is, in the opinion of the official receiver, calculated to benefit the general body of creditors.

"(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter, in the prescribed form, addressed to the official receiver so as to be received by him not later than the day preceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting.

"(5) The debtor or the official receiver, may, after the proposal is accepted by the creditors, apply to the court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved.

"(8) The court shall, before approving the proposal, hear a report of the official receiver as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

"(9) If the court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the court shall refuse to approve the proposal.

"(10) If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than five shillings in the pound on all the unsecured debts provable against the debtor's estate.

"(11) In any other case the court may either approve or refuse to approve the proposal.

"(19) No composition or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt.

"21. (1) Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication."

The corresponding provisions of the Presidency-towns Insolvency Act are contained in sections 28 & 29. Under the Presidency-towns Insolvency Act, a composition can be submitted after the adjudication and not before

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it, as it is under the Provincial Insolvency Act. And the procedure, so far as section 38 of the Act is concerned, is almost the same as under the Presidency-towns Insolvency Act. There are two points of difference between the provisions of the Acts relating to compositions and schemes of arrangement. The one is as to the binding effect of composition or scheme; the other is as to the remedy of creditors to enforce payment under a composition or scheme in default of payment. These two points are discussed under sections 39 and 40 respectively.

Composition apart from Insolvency Acts—Sections 38, 39 and 40 deal with compositions between a debtor and his creditors under the insolvency law. There is, however, no bar for a debtor to compound the claims of his creditors or make any other arrangement for the settlement of his affairs. Arrangements between debtors and creditors are known as composition arrangements. A composition agreement may take the form of an agreement by which the creditors agree to abandon their claims in consideration of receiving a composition on their debts, that is, a smaller sum bearing an agreed proportion to the amount of their respective claims. It may also take the form of an assignment by which the debtor assigns the whole of his property to a trustee for realisation and rateable distribution of the proceeds amongst all his creditors or amongst those who assent to and take the benefit of the assignment and the creditors in consideration of such assignment release their original claims and accept the dividends payable under the agreement in discharge of their debts. Such an assignment is valid unless an insolvency petition is founded upon it as an act of insolvency. After the expiry of three months, such an assignment ceases to be an act of insolvency. The mere fact that all the creditors do not sign the agreement, but at the same time they also had not started insolvency proceedings against the debtor does not make it invalid (1). The term "composition deed" is a well-known term of art, familiar to lawyers. The insolvency or embarrassed circumstance of the debtor is one essence of a composition deed. Another essential feature of it is that, where the debtor, with consent of the creditors, appoints a trustee to take charge of all his property for the purpose of giving effect to the composition, the trustee is for the creditors only to the extent of that purpose, but no right in the property itself is transferred to the creditors. The trustee holds the property for the debtor, who remains in the eye of law the owner, and for the benefit of the creditors. And a composition deed for the benefit of all the creditors, even though it does not comprise the whole of the property of the judgment-debtor, is not void, if the transaction is fair and *bona fide*, made in the ordinary course of business or upon the pressure of the creditors. It does not become void by the circumstance that it is signed by some only of the creditors and that among them are some whose debts are barred by limitation (2).

Analysis of the section.—In sub-sections (1) and (2) we have conditions which must be satisfied before the court can proceed to consider the proposal on its merits. Unless the composition is submitted by the debtor and accepted by the creditors the court cannot

(1) *Manindra Chandra v. Lal Mohan Roy*, 120 I. C. 577 : 56 Cal. 940 : A. I. R. 1929 Cal. 358.

(2) *Maluk Chand v. Manilal*, 28 Bom. 364 (case decided under section 17 (e), Indian Registration Act 1877).

S. 38. entertain the proposal (1). After the proposal has been submitted and duly accepted by the creditors the court will consider the composition and see whether it is bound to refuse to approve the proposal under sub-section (4). If sub-section (4) does not apply, then the court has to see whether any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge and that reasonable security for payment of not less than six annas in the rupee is provided. It is also to see whether sub-section (6) is satisfied or not. In any other case the court may either approve or refuse to approve the proposal.

Thus we see that the power of the court in the matter is different under different circumstances. The first point to be noted is that the court is not bound to approve the scheme in any case. Approval of composition is left by the section in the absolute discretion of the court. The second point to be noted is that unless the composition is accepted by the creditors the court has no jurisdiction to entertain it. Acceptance by the creditors is a condition precedent to the cognizance of the proposal by the court. The third point to be noted is that the court is bound to refuse to approve the proposal if the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or where it does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent. Again, the court is bound to refuse to approve the proposal except when certain conditions are fulfilled. We have such a case in sub-section (5). It will thus be seen that the court's power to refuse to approve the proposal is unrestricted, but its power to approve the proposal is limited by the statute.

After the making of an order of adjudication.—The proposal can be submitted only after the making of an order of adjudication and not before it. Where the composition is presented after the presentation of the insolvency petition and before adjudication the insolvency court may dismiss the petition by consent or may allow it to be withdrawn. A composition scheme filed before the order of adjudication cannot be put into operation after the order of adjudication is passed (2).

Details of scheme of composition.—The debtors should set out in the scheme itself what their assets are and what their scheme of composition is; if the assets are to be vested in a trustee or trustees, there must be a statement to that effect and if the trustee or trustees are to guarantee so much money to their creditors there must be a proper statement to that effect also. The details should be clear and specific (3).

Notice to creditors.—A date must be fixed for the consideration of the proposal and all the creditors should be informed of the date. Manner in which notice is to be given has been prescribed by rules framed under section 79. See Calcutta Provincial Rule 16, Madras Provincial Rule 10, Bombay Provincial Rule 11 and Allahabad Pro-

(1) See *Behary Lal Sikdar v. Harsukh Das Chakmal*, A. I. R. 1921 Cal. 376 : 61 I. C. 904; *Shafiquz Zaman v. Deputy Commissioner, Barabanki*, A. I. 1915 Oudh 173 : 30 I. C. 694; *Shankarlal v. Hakim Sayyad Ali Ahmed*, A. I. R. 1935 All. 102 : 160 I. C. 694 : 58 All. 655.

(2) *Brojendra Nath Ghose v. Satish Chandra Das*, 145 I. C. 185 : A. I. R. 1933 Cal. 495 (2).

(3) *Narayan Singh Sundar Singh v. Attar Singh*, A. I. R. 1933 Cal. 129 : 59 Cal. 1436 : 141 I. C. 860.

vincial Rule 19. It is provided by the Madras and Bombay rules that a copy of the terms of the proposal should be sent to every creditor who has proved his debt. Unless notice is issued and the creditors are given an opportunity to accept the proposal, the entertainment of the proposal by the court and its approval are illegal (1). **S. 38 (2) (3).**

Sub-section (2); acceptance by creditors.—Sub-section (1) requires that the proposal must be placed before creditors for consideration on a date fixed for the purpose. Under sub-section (2) the proposal shall be deemed to be duly accepted by the creditors if a majority in number and three-fourths in value of all the creditors, whose debts are proved and who are present in person or by pleader, resolve to accept the same. The creditors entitled to vote are those whose debts are proved. The debts must have been proved in the manner prescribed by the Act. See section 34 for debts provable under the Act, section 33 for framing the schedule of creditors and section 49 for the mode of proof. In insolvency matters the schedule of creditors should be settled at as early a date as possible and where an application under S. 27, P. I. A., 1907, (corresponding to S. 35, P. I. A., 1920), is made, before a proposal for composition is finally accepted, no creditor is entitled to vote whose debt has not been proved and whose name has not been admitted to the schedule by the judge (2). Section 38 does not prescribe the exact stage when the composition scheme can be submitted, except that it shall be done after the order of adjudication. Section 33 requires that the schedule of creditors shall be framed when an order of adjudication is made. Where the schedule of creditors is not yet ready and a proposal is submitted under section 38, it is desirable that the consideration of the proposal should be postponed till the schedule is ready. Under section 39 it is enjoined upon the court to frame a schedule after the court has approved the proposal and the terms have been embodied in an order of the court. Section 39 cannot be so read as to mean that the schedule may not be ready when the proposal is finally considered. Section 39 is only intended for those creditors who seek to prove after composition and according to the terms of the composition. A creditor may vote at the meeting in person or by pleader. If there is any doubt as to the right of the creditor to vote, he should be generally allowed to vote, subject to the vote being declared invalid in the event of the objection being sustained. The mere absence of objection by creditors does not give rise to a presumption that the creditors have accepted it. To satisfy the conditions of the sub-section it is necessary that a majority in number and three-fourths in value of the creditors should have accepted the proposal by being present at the meeting in person or by pleader, and by voting for it. A creditor who does not vote in effect votes against the proposal.

Sub-section (3).—The sub-section provides for the amendment of the terms of the proposal by the debtor. The amendment shall, however, be allowed by the court only if it is in the interests of the general body of creditors. The court itself has no power to amend the terms of the proposal (3). Thus where a trustee in bankruptcy made an agree-

(1) *Assadullah Khan v. Sant Ram*, 80 I. C. 740 : A. I. R. 1926 Lah. 87.

(2) *Chandan Lal v. Khem Raj*, A. I. R. 1917 All. 239 (2); (1917) 15 A. I. J. 538 : 40 I. C. 156, but see *Krishna Chandra Das v. Jitindra Nath*, 114 I. C. 415 : A. I. R. 1929 Cal. 159 (2).

(3) *Mamoojee Moosajee v. N. M. Meera Moideen Bros.*, (1927) 5 Rang. 241 : 103 I. C. 181 : A. I. R. 1927 Rang. 176.

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(4).

ment with third parties, subject to approval by the court of a scheme and the creditors accepted the scheme embodying the agreement, but with a² additional obligation, and the court approved the agreement as originally made, and annulled the bankruptcy, it was held that the trustee could not obtain specific performance because the creditors not having accepted the agreement in the form in which it was made there had been no approval by the court of the scheme (1).

Sub-section (4).—Sub-section (4) gives cases when the court is bound to refuse to approve the proposal. The court shall so refuse if the terms of the proposal are not reasonable or if they are not calculated to benefit the general body of creditors. A scheme containing a provision that the debtor shall be discharged when the committee of inspection shall so resolve was held to be unreasonable (2). The time for the discharge of the insolvent is to be fixed by the creditors subject to the approval of the court and the discretionary power of the court cannot be handed over to anyone else. Nor will a scheme be approved if a large number of the debts mentioned in the statement of affairs have not been proved, or if the court thinks that the proofs require investigation (3). A scheme of arrangement must give the creditors some advantage which they would not have in bankruptcy (4). A scheme which gives the creditors no greater advantage than they would have in bankruptcy, while he deprives them of some of the powers which they would have had and of the control of the court over the administration of the estate, is neither reasonable nor calculated to benefit the general body of creditors (5). The scheme must be calculated to benefit not merely the creditors who have agreed to it, but the general body of creditors, that is, all creditors, and not a limited number of them (6).

Report of the Receiver.—In forming its opinion as to whether a proposal is reasonable or calculated to benefit the general body of creditors the court has to hear the report of the receiver, if a receiver has been appointed. Under section 41, sub-section (2) the report of the receiver is to be deemed to be evidence, when the debtor applies for his discharge. Though it is not expressly provided, yet it seems that the receiver's report has the same evidentiary value under the section. The reason is that the court has on such an application to consider all the matters which it has to do on an application for discharge (7). In making his report, it is the duty of the official assignee or receiver to form his own judgment; he should not be influenced by the wishes of the creditors (8). It is also his duty to report fully to the court, and the duty is in no respect limited or diminished by the fact that he has approved the scheme and made a report to the creditors to that effect (9). The court is, however, not bound to accept the

(1) *Lucas v. Martin*, 37 Ch. D. 597.

(2) *Exp. Clark*, 13 Q. B. D. 426.

(3) *Exp. Rogers*, 13 Q. B. D. 438.

(4) *Re Aylmer*, 19 Q. B. D. 33; *In re Walter Wood*, (1868), 4 T. L. R. 277; *In re Browne & Wingrove, Ex parte the Debtors*, 1890 W. N. 131; *In re E. A. B.*, 1902, 1 K. B. 457; *In re Gopaldas Versimal*, A. I. R. 1928 Sind 90: 107 I. C. 433.

(5) *Ex parte Bischoffsheim*, (1887) 18 Q. B. D. 33.

(6) *Flint v. Barnard*, (1889) 22 Q. B. D. 90, 94.

(7) *Ex parte Campbell*, 1885, 15 Q. B. D. 213.

(8) *Ex parte Campbell*, (1885) 15 Q. B. D. 213.

(9) *Re Bottomley*, 1893, 10 Morr. 262.

report. In *Re Burr* (1), the Court of Appeal, at the instance of the Board of Trade, refused to approve, although the official receiver had reported in favour of the scheme, and had appeared and stated that he did not object to it on the hearing before the Registrar, and the Registrar had approved it. S. 38
(5).

Sub-section (5) ; Court bound to refuse unless certain conditions are fulfilled.—Where a proposal for a scheme of arrangement is submitted for the approval of the court, and facts are proved, on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than 6 annas in the rupee, on all unsecured debts provable against the debtor's estate. Cases where the court would be required either to refuse, suspend or attach conditions to the debtor's discharge are laid down in section 42 of the Act. "Reasonable security" means not such security as it would be reasonable that a prudent man should invest money upon, but a reasonable commercial probability that the amount named will be realised, having regard to the state of affairs presented to the creditors (2). Thus where the proposal was to vest all the property in a trustee till a composition of twenty shillings in the pound had been paid by instalments of not less than two shillings and six pence in the pound as and when the realisation of the assets would allow, it was held that the scheme did not 'provide reasonable security' (3). Again the scheme should provide for payment forthwith or within a short time. Where it provided for payment at a distant time, as after a year, the scheme cannot be said to provide reasonable security (4). Even if the scheme provides reasonable security, the court is not bound to approve the scheme, for it has a discretion in the matter (5).

Unsecured debts provable against the debtor's estate.—In order to provide for payment of 6 annas in the rupee the court has to consider all the unsecured debts provable against the debtor's estate. The composition need not be found on the amount of debts provable at the date of the receiving order, but only on those remaining provable at the time of the composition being approved, excluding, therefore, debts properly released before that time (6). But such releases must be absolute, and not made conditional on the scheme going through. The terms on which the debts have been released must be shown on the face of the proposal; and, it seems, the releases must not have been procured by or with the privity of the debtor (7). Yet it cannot be laid down that in no case would it be possible for the court to approve the scheme, if it thought there had been full disclosure of all the facts and all the negotiations for the scheme (8). The court has to see in each case as to whether the agreement which has led to the release of the debt is a good one and not contrary to the words and policy of the Bankruptcy Act. Thus in a case where after the acceptance of the composition by the

(1) (1892) 2 Q. B. 467.

(2) *Re Bottomley*, 10 Mor. 262.

(3) *Re Flew*, (1905) 1 K. B. 278.

(4) *Re Paine*, (1891) W. N. 208; *Re Webb*, (1914) 3 K. B. 387, 392.

(5) *Re Burr*. (1892) 2 Q. B. 467.

(6) *Re E. A. B.*, (1902) 1 K. B. 457.

(7) *Re Pilling*, (1903) 2 K. B. 50.

(8) *Re Flew*, (1905) 1 K. B. 284.

S. 38 creditors and before the completion of the composition the debtor entered
(6) (7). into an agreement with a creditor bound by the resolution to pay him his debt in full, even though the agreement was made for valuable consideration such as giving fresh credit to the debtor, it was held that the agreement was invalid (1). A secret preferential agreement made with the creditor before the passing of the composition resolution would not only be void as being contrary to the words and policy of the Bankruptcy Act, but even in the case of a common law composition would be void as a fraud upon the creditors (2), and this, even though the creditor may give some consideration, such as to become a surety for the composition, for the preference (3). So, too, a similar agreement with a third person would be void. Thus, where a bank, after proceedings for liquidation had been commenced, secretly took from the debtor's brother a guarantee that their loss should not exceed £ 2,000, and on that account did not oppose a composition, it was held that the bank could not obtain specific performance of the agreement (4). Where, however, the composition discharged both the debtor and his goods, a contract between the debtor and a third party, who guaranteed the payment of an instalment of the composition, to deposit goods with him for indemnity, although not communicated to the creditors, was held not to be fraudulent, because the goods were left at the disposal of the debtor by the terms of the composition (5). It is no objection to the approval of a scheme or composition that withdrawals of some of the debts have been obtained on terms giving the withdrawing creditors an advantage over the others, provided that the withdrawals have not been obtained by the insolvent himself or with his knowledge. Thus where the withdrawals were obtained by the insolvent's brother without any knowledge on the part of the insolvent himself, it was held that it was not a good ground for the court refusing to sanction the scheme (6).

Sub-section (6).—By section 61 of the Act it is provided that certain debts shall be paid in priority to all other debts. The sub-section provides that unless the composition scheme complies with that provision in the distribution of the property of the insolvent under the composition, the court shall refuse to approve it.

Sub-section (7).—The court is not bound to accept the composition in any case. The fact that the proposal is approved by the creditors (7) or that the conditions laid down in sub-sections (4), (5) and (6) are satisfied (8) are not sufficient grounds to restrict the discretion of the court. The object of giving this discretion to the court is two-fold. On the one hand it has to see and guard against a majority of creditors from dealing recklessly not only with their property, but with that of the minority, and on the other it has to enforce a more careful and moral conduct on the debtor's part. Dealing with this question, Lord Esher, Master of the Rolls, said in *Ex parte Reed* (9):—

(1) *Exp. Barrow*, 18 Ch. D. 464.

(2) *Cockshott v. Bennett*, 2 T. R. 763; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Daughlish v. Tennent*, L. R. 2 Q. B. 49; *Exp. Phillips*, 36 W. R. 567; *Exp. Milner*, 15 Q. B. D. 605.

(3) *Wood v. Barker*, L. R. 1 Eq. 139; *Bissell v. Jones*, L. R. 4 Q. B. 49.

(4) *McKewan v. Sanderson*, L. R. 20 Eq. 65.

(5) *Exp. Burrell*, 1 Ch. D. 537.

(6) *Re E. A. B.*, (1902) 1 K. B. 457.

(7) *Shafiq-uz-zaman v. Deputy Commissioner, Bara Banki*, A. I. R. 1915 Oudh 173; 30 I. C. 694.

(8) *Re Burr*, (1892) 2 Q. B. 467, *per* Lord Esher.

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"In my opinion this Act was passed because it has been proved to the satisfaction of the legislature that a majority of creditors, however large, was not careful, and was not to be trusted; that on the contrary, the creditors were generally utterly careless, that they wrote off their debts as bad, and agreed to terms which might give some possibility—an evanescent chance—of their getting something out of the wreck. It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of creditors that power which they had so recklessly used, and putting a controlling power into the hands of the court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing the majority of creditors from dealing thus recklessly not only with their own property, but with that of the minority, and of enforcing, so far as the legislature could, a more careful and moral conduct on the part of debtors."

Thus at the time of approving the composition the court would consider the interest of creditors as well as the conduct of the debtor. The discretion is to be exercised with due regard to the public and the requirements of commercial morality and the conduct of the debtor on the one hand, and to the best interests of the creditors on the other (1). In considering the conduct of the debtor the court shall have regard to all the circumstances of the case. The mere fact that the debtor had committed offences which would have prevented his immediate unconditional discharge will not bind the court to refuse its approval (2). Misconduct to justify a refusal to approve must be of a gross character, such as would make it against public policy to sanction the scheme. On appeal the court will form its own judgment upon all the circumstances of the case, though it will not readily overrule the discretion of the court below (3). If the circumstances under which the offences were committed are such that, although he has done wrong, the debtor need not in the interest of the State be treated as a person with whom the creditors ought not to be allowed to negotiate, the court is at liberty to approve the scheme, notwithstanding the commission of those offences. In one case where the security provided by the scheme was reasonable, but the misconduct alleged against the bankrupt was that he contributed to his bankruptcy by rash and hazardous speculations, it was held that such misconduct was not by itself a sufficient ground for refusing approval of the scheme. Vaughan Williams, L. J., said, "To my mind though there might be a case where the rash and hazardous speculations had been so continued or of such a character as to make it against public policy that a man who might be described as a confirmed gambler should get a scheme sanctioned at all, this is not a case of that sort" (4). In another case where the charges against the bankrupt were that he had omitted to keep usual and proper books of account, that he had contributed to his bankruptcy by rash and hazardous speculations and that he had on two previous occasions been adjudged bankrupt, Fry, L. J., held: "I look not merely at the fact of

(1) *Re Barlow*, 3 Mor. 304, 309; *Re M-tear*, 5 Mor. 182; *Re Staniar, Roberts & Co.*, 29 Q. B. D. 544; *Re Burr*, (1892) 2 Q. B. 467; *Re E. A. B.*, (1902) 1 Q. B. 457.

(2) *Re Genese*, 18 Q. B. D. 168; *Re Bottomley*, 13 Mor. 262.

(3) *Exp Rogers*, 13 Q. B. D. 538; *Exp. Campbell*, 15 Q. B. D. 213; *Exp. Reed & Bowen*, 17 Q. B. D. 244; *Re Postlethwaite*, 3 Mor. 169.

(4) *Re E. A. B.*, (1902) 1 K. B. 457, 467.

S. 38. these technical offences having been committed, but at a whole career as disclosed by the evidence, and I say that in such a case the court ought to adjudicate upon the debtor's discharge, and to determine whether it should be refused, suspended or granted subject to conditions. I regard this debtor as one of those plagues of society of whom there are too many, and upon him I think it is the duty of the bankruptcy court to keep a sharp eye. In the exercise of my judicial discretion, I therefore refuse to approve of this scheme" (1).

If, however, the court comes to the conclusion that however beneficial to the creditors the scheme may be, yet it is not to the interest of the public or of commercial morality that the bankruptcy should be annulled it is its duty to refuse to annul it (2). Where the scheme was that the whole of the insolvent's assets should be assigned to one of the creditors on his undertaking to pay the other creditors six annas in the rupee and the court approved of the same because the majority had approved it; secondly, it was represented for those creditors that if the official receiver administered the estate of the insolvent that would lead to considerable delay and expense and thirdly, the court had offered the assets of the insolvent to the objecting creditor on the same terms and he was not willing to accept the offer, but it appeared on the other hand that the court had omitted to consider a number of circumstances, namely, that the official receiver had reported against the scheme, that the extent and value of the assets belonging to the insolvent were in doubt, that the insolvent's conduct in failing to appear before the official receiver and produce accounts was bad, that the creditor who had taken over the assets of the insolvent under the scheme was a very near relation of his, that the insolvent had himself admitted that his object in consenting to the scheme was to revive his money-lending business and that the scheme was not in fact profitable to the creditors, it was held that the lower court had erred in attaching too much weight to the circumstance that the majority of the creditors had approved of the proposed scheme and in failing to take into account the other important aspects of the matter, and that in the circumstances the scheme should not have been approved. In view of the delay and the practical difficulties in restoring the *status quo* the order of the lower court was, however, not set aside (3). The insolvent so long as his insolvency lasts, cannot be allowed to challenge the correctness of the debts entered in the schedule and, therefore, his application disputing the correctness of those debts and requesting the court to enquire into the accounts of the creditors, cannot properly be a proposal or a composition within the meaning of section 38. The proposal contemplated by section 38 is a general proposal to satisfy the debts of the whole body of creditors and not merely disputing the validity of the debts of particular creditors (4). After a composition or scheme has been accepted by the creditors, the court may, on the application of the insolvent, hold an enquiry and expunge or reduce a proof (5).

(1) *Re Burr*, (1892) 2 Q. B. 467.

(2) *In re Beer*, (1903) 1 K. B. 628 : 72 L. J. K. B. 366 : 51 W. R. 422 ; *Mamoojee Moosajee v. N. V. Meera, Moideen Bros.*, A. I. R. 1927 Rang. 176 : 5 Rang. 241 : 103 I. C. 181.

(3) *Sevugan Chettiar v. Murugappa Chettiar*, 54 Mad. 823 : 132 I. C. 134. A. I. R. 1931 Mad. 344.

(4) *Ganga Sahai v. Mukarram Ali*, 97 I. C. 556 : A. I. R. 1926 All. 361.

(5) *Re Benoist*, (1909) 2 K. B. 784 ; section 50 (2), P. I. A., 1920.

S. 39.

Secured creditors.—A secured creditor need not take any part in the composition proceedings, and when he has realised his security he may come in and prove for the deficiency, if any, on the footing of the composition (1). Otherwise he is unaffected by any composition scheme unless it is approved by the court and consented to by him (2).

Liability of surety.—As soon as the court sanctions a composition entered into by the debtor and his creditors supported by the guarantee of surety, it becomes binding on the creditors, the debtor and the surety. Therefore it is not open to the surety after such sanction to say that he is not bound by his promise. And although the surety does not execute a bond as ordered by the court, he is not relieved of his liabilities as a surety (3). Where, however, a composition is annulled and the debtor is re-adjudicated bankrupt, a surety for the composition is discharged (4). Under the Indian Acts when a composition or scheme is annulled and the debtor is re-adjudged insolvent, the liability of the surety who had covenanted to pay the composition comes to an end and he cannot be sued upon the covenant (5). The Insolvency Court to which the bond is furnished has power to enforce the terms of the bond (6).

Appeal.—Generally where proceedings have taken place under sections 38 and 39 there is no appeal as of right. Leave of the district court or of the High Court must be obtained before any appeal can be admitted against the order generally approving the proposal or the order of annulment. But where, as part of the proceedings, an enquiry has been held under section 50, anybody prejudiced by the expunging or reducing of the debt can in regard to that matter appeal as of right (7).

Miscellaneous.—Proceedings under section 38 are not allied to proceedings under section 35. In the later case the insolvent has to show that the debts have been paid in full, which implies that the debts have been paid along with interest at the contractual rate, while section 38 contemplates a proposal for a composition in satisfaction of debts and implies a reduction in the claim of the creditors. Hence rejection of an application by the insolvent under section 35 does not bar on the principle of *res judicata* an application by him under section 38 (8).

39. If the Court approves the proposal the terms shall be embodied in an order of the Court, and the order of adjudication shall be annulled and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the debtor and provable under this Act.

(1) *Re Hardy*, (1896) 1 Ch. 904. See also *McMurdo*, (1902) 2 Ch. 684.

(2) *Jugmohan Badhani v. Indra Chandra*, 63 I. C. 895 (Cal.)

(3) In *Re Sat Narain Stores*, A. I. R. 1934 Sind 134 : 151 I. C. 791.

(4) *Walton v. Cook*, 40 Ch. D. 325.

(5) *Govind Das Pity v. Jardine Skinner & Co*, 80 I. C. 849 : A. I. R. 1924 Cal. 176.

(6) *Subramania Ayyar v. Suprayya Pillai*, A. I. R. 1936 Mad. 424 : 161 I. C. 717.

(7) *Ganga Sahai v. Mukarram Ali*, A. I. R. 1926 All. 361 : 97 I. C. 556.

(8) *Shankarlal v. Hakim Sayyad Ali Ahmad*, A. I. R. 1936 All 102 : 58 All 655 : 160 I. C. 994.

S. 39. **History.**—The present section, before it was amended by the Provincial Insolvency (Amendment) Act, 1935, Act No. X of 1935, stood as follows :—

“If the Court approves the proposal, the terms shall be embodied in an order of the Court, and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein.”

The section, as it stood before 1935, corresponded to section 27 clause (7) of the Act 3 of 1907, except that the words “and the provisions of section 37 shall apply” were added in the Act 5 of 1920.

The object of the amendment of 1935 has been thus explained :—

“There is judicial authority for the proposition that a composition under section 39 of the Provincial Insolvency Act, 1920 (V. of 1920), releases the insolvent only from debts entered in the schedule and not from a debt in respect of which the creditor has not taken part in the insolvency proceedings, whereas S. 30 of the Presidency-towns Insolvency Act, 1909 (III of 1909) releases the insolvent from all debts provable in insolvency. A comparison of section 44 of the former Act and section 45 of the latter Act indicates that the effect of an order of discharge is substantially the same under both the Acts and there is no good reason why the effect of a compromise should not similarly be the same. This Bill is devised to assimilate the terms of S. 39 of the Provincial Insolvency Act, 1920, to those of S. 30 of the Presidency-towns Insolvency Act, 1909 (1).

Analogous Law.—The corresponding sections of the Presidency-towns Insolvency Act, Bankruptcy Act, 1883, and Bankruptcy Act, 1914, are section 33, section 3 (11) (12) (14) and section 16 (11) (12) (14) respectively.

S. 30, P-t. I. A., runs as follows :—

“If the Court approves the proposal the terms shall be embodied in an order of the Court, and an order shall be made annulling the adjudication, and the provisions of section 23, sub-sections (1) and (3) shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency.

(2) The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.”

The relevant provisions of the Bankruptcy Act, 1914, are as follows :—

“Section 16 (12). If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposed composition or scheme. or by the terms being embodied in an order of the court.

Section 16 (13). A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order,

or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the court expressly orders in respect of such liability. **S. 39.**

Section 16 (15'. The provisions of a composition or scheme under this section may be enforced by the court on application by any person interested, and any disobedience of an order of the court made on the application shall be deemed a contempt of the court."

From the above provisions it may be seen that the law under the Presidency-towns Insolvency and the Bankruptcy Acts is almost the same, but it differed from that under the Provincial Insolvency Act before the amendment of 1935 in two important particulars. Under the former Acts, an order under S. 30, P-t. I A., or S. 16, B. A., 1914, has the effect of an order of discharge and is equivalent thereto (1). No action will lie on the original debt (2), nor can a creditor who has obtained judgment against the debtor issue execution on it (3). Under the Provincial Insolvency Act an order of approval of composition bound only those creditors whose names were entered in the schedule. The difference appears to have been caused by mistake or oversight of the framers of the latter Act. Under the Act III of 1907 an order of discharge under section 45 (2) released the insolvent from the debts entered in the schedule only. Under that Act, therefore, an order of approval of composition and an order of discharge had the same effect. Under the new Act, the operation of an order of discharge was enlarged by section 44, now providing that it shall release the insolvent from all debts provable under the Act. At the time of making this change in the scope of section 44, the section relating to compositions was not amended so as to bring it in line with the amended section 44. The amendment of 1935 has now removed the difference, but the second one hereinafter mentioned still exists. The second important point relates to the mode in which the composition may be enforced by the insolvency court. Under section 16 (15), B. A., 1914, and section 30, P-t. I A., the payment of any instalment due under a composition may be enforced by an application to the court and any disobedience of an order of the court made on the application is deemed a contempt of court and dealt with as such. The Provincial Insolvency Act does not contain any such provision. A provincial court has no power to commit for contempt of court. If a default is made in payment under a composition or scheme a suit appears to be the only remedy, where the court is not prepared to re-adjudge the insolvent under section 40.

The terms shall be embodied in an order of the court.—The section requires that on approval of a proposal for composition the terms shall be embodied in an order of the court, and the order of adjudication shall be annulled. Omission to incorporate the terms of the proposal in an order of the court is a mere formal defect which can be remedied at

(1) *Ex parte* Clark, 1884, 13 Q. B. D. 426; *Re* Crooms, 1899, 1 Ch. 1695; *Flint v. Barnard*, 1888, 20 Q. B. D. 90; *Ganpat Rai v. Kani Ram*, A. I. R. 1926 Allahbad 298; 92 I. C. 535; *Re* Krishna Kishore Adhicary, 1927, 54 Cal. 650; 105 I. C. 90; A. I. R. 1928 Cal. 21.

(2) *Flint v. Barnard*, 1888, 22 Q. B. D. 90; *Ganpat Rai v. Kani Ram*, 92 I. C. 535; A. I. R. 1926 All. 293.

(3) *Seaton v. Lord Deerhurst*, 1895, 1 Q. B. 853.

- S. 39.** any time and which does not affect the annulment (1). It is, however, an irregularity which the court should avoid to commit (2).

Framing of schedule as required before the amendment of 1935.

—Under section 33 of the Act the court frames a schedule of creditors soon after an order of adjudication is made. Under section 39 the court is required to frame the schedule in accordance with the provisions of section 33 (3). Persons who have proved their debts already before the proposal was placed before the court for consideration need not prove again after the approval of the proposal. The special provision made in section 39 is intended for those creditors whose consent was not obtained under section 38 because their debts had not been proved at the time when the composition was considered. Such creditors can, however, come in after the composition (4). Their rights in insolvency shall be as if they were bound by the composition. Such creditors are, however, not bound to come in and prove in insolvency. This brings us to the next point which we proceed to consider.

Effect of approval of composition on rights of creditors: Law before the amendment of 1935. —The composition or scheme is binding only on those creditors who were parties to it or whose names are entered in the schedule. It does not bind those creditors who have not proved their debts and whose names are not entered in the schedule of creditors. Such a person can proceed to enforce his debts in a civil court by the institution of an ordinary suit (5). In a case it was held by the Madras High Court that all creditors mentioned in the insolvency petition schedule are bound by the composition which has been approved by the court and must come on footing of it and cannot have any remedy *dehors* the insolvency proceeding (6). This view has not been followed in subsequent cases of the same High Court. Where a composition was approved by the court, one of the creditors, who had a decree against the insolvent did not prove his debt in insolvency and was not a party to the composition proceedings, sought to execute the decree by arresting the judgment-debtor after annulment of the order of adjudication, it was held that the creditor was entitled to pursue the remedy he liked. It was also held that the law under the Presidency-towns Insolvency Act carries out the policy of the insolvency law more correctly, inasmuch as a composition under that Act even binds a creditor who could prove his debt but does not do so (7). In a case the debt was mentioned in the insolvency petition and

(1) *Bombay Company, Ltd., v. The Official Assignee of Madras*, 1921, 44 Mad. 381 : 63 I. C. 173.

(2) *Ganga Sahai v. Mukarram Ali Khan*, 97 I. C. 556 : A. I. R. 1926 All. 361.

(3) *Gopalupillai v. Kothumbaram Ayyar*, A. I. R. 1934 Mad. 529.

(4) *Kamireddi Timmatta v. Devasi Harpal*, 115 I. C. 815 : A. I. R. 1929 Mad. 157.

(5) *Ram Sarup v. Sheikh Khalil-ul-rahman*, 87 I. C. 348 : A. I. R. 1925 Lah. 37 ; *Khalil-ul-rahman v. Ram Sarup*, 25 I. C. 204 : A. I. R. 1926 Lah. 489 ; *Firm of Menghraj v. Firm of Bir Bhan Das*, 76 I. C. 250 : A. I. R. 1924 Sind 122 ; *Motumal Kishan Das v. Ghansham Das-Parmanand*, 120 I. C. 84 : A. I. R. 1929 Sind 204 ; *Duni Chand-Daulat Ram v. Jita Ram*, 141 I. C. 260 : A. I. R. 1933 Lah. 187 (1).

(6) *Kamireddi Timmatta v. Devasi Harpal*, 115 I. C. 815 : A. I. R. 1929 Mad. 157.

(7) *Thangeswari Chettiar v. Ramamurthi Chetti*, A. I. R. 1935 Mad. 602 : 159 I. C. 689.

was acknowledged to be due, but in the composition no provision was made for discharging it. When, after the composition was sanctioned by the court, the creditor sought to prove the debt in insolvency his claim was disputed by the sureties who had taken over the insolvent's liabilities and thereupon the creditor withdrew the application. The creditor subsequently filed a suit against the debtor and the surety pleaded S. 39, P. I. A., in defence. It was held that the surety and the creditor had agreed that the debt was to be excluded from the composition and that in those circumstances S. 39, P. I. A., could not be any bar to a suit upon the excluded claim (1). Similarly where the holder of a promissory note agrees that the promissory note shall be left out of consideration in the settlement proposed and does not offer any obstacle to it but at the same time he does not give up his rights, the holder is not precluded from recovering the debt on the promissory note by a suit (2).

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Amendment of 1935.—The amendment of 1935 has now enlarged the scope of a composition by making it equivalent to that of a discharge. The requirement for framing a schedule has, therefore, been dispensed with and a debt, provable under the Act, but not proved, is discharged even where the adjudication is annulled on approval of a composition.

Effect of approval of composition on debtor's power over property.—On approval of the composition the order of adjudication is annulled and the provision of section 37 applies. Subject to an order of the court under that section, the debtor's property reverts to him and he can deal with it as if he had been the owner thereof. As regards after-acquired property it appears that the same rule holds good. In order to give effect to the composition the debtor should have power to deal with his estate by realising it in the ordinary course of business; that he should have such a power seems necessary on practical grounds. To what extent, if at all, he may pledge his property as security to a new creditor, except for the purpose of raising money to pay the composition, is doubtful. Under section 40, when the debtor is re-adjudged insolvent all debts which have been contracted before the date of such re-adjudication and are otherwise provable, become provable in insolvency. This provision appears to put debts contracted before the approval of the composition and those contracted after it on the same footing. Its effect is to deprive the new creditor of any right to avail themselves of the doctrine of *Troughton v. Gilley* (3), that a man cannot stand by, having a charge or incumbrance upon property, and allow another to advance money on it on the supposition that it is unencumbered.

Jurisdiction of court after approval of composition.—We have already considered the effect of annulment on approval of a composition on insolvency proceedings under section 37. The order of annulment does not necessarily put an end to the insolvency proceedings. At the same time the insolvency proceedings do not continue for all purposes so as to make every section in the Act applicable. The control that the insolvency court retains of the insolvency even after orders under S. 39, P. I. A., are passed, exists in order that the composition may in fact be carried out. Insolvency proceedings are continued only for the purpose of giving effect to the composition but they do not continue for all the

(1) *Marula Sidhayya v. Gadigi Muddappa*, A. I. R. 1935 Mad. 929 : 158 I. C. 592.

(2) *Gopalu Pillai v. N. R. Cothandarama Ayyar*, A. I. R. 1934 Mad. 529 : 153 I. C. 916 : 57 Mad. 1082.

(3) 1766, Amb. 629.

- S. 40.** purposes except so far as sections 37 and 40 require their continuance. Otherwise the proceedings are at an end and the leave of the court is not necessary under section 28 for the institution of a suit by a creditor not bound by the composition (1).

The power of a trustee under a composition-deed depends upon its terms. A trustee was entrusted with the assets of an insolvent debtor to pay the creditors who proved their claims. After paying the demands made, a balance was left in his hands as some of the creditors did not make their demands or take steps to do so. The debtor applied for that amount being paid to him. It was held that the unclaimed balance was in the hands of the official assignee not as official assignee but as a trustee and that he had the power to pay the same to the debtor (2). After an adjudication is annulled on approval of a composition the right to sue for debts or damages for breach of contract due to the insolvent vests in the trustees appointed under the composition, if the estate of the insolvent is vested in them (3).

Costs of receiver.—Where an adjudication is annulled on an approval of the composition or scheme, the costs of the receiver should be recovered out of the estate of the insolvent (4).

Retrospective effect of Act 3 of 1907.—The provision of S. 27, Punjab Laws Act, 1872, under which the court was bound to give effect to a composition, was materially different from S. 28, P. I. A. 1907, under which the court could impose conditions. As the latter Act made important alterations in the substantive rights of the parties, it was held that orders in connection with a composition-deed filed before the Act 3 of 1907 came into force, should have been made under the old law (5).

40. If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, re-adjudge the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is re-adjudged insolvent under this section, all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

(1) *Marula Sidhayya v. Gadigi Mudappa*, A. I. R. 1935 Mad. 929 : 158 I. C. 592.

(2) *Pareesh Ram v. Official Assignee of Calcutta*, A. I. R. 1933 Cal. 387 : 60 Cal. 313 : 144 I. C. 216.

(3) *Motha Ram Daulat Ram v. Pahlaj Rai Gopal Das*, A. I. R. 1925 Sind 159 : 80 I. C. 141.

(4) *Arjan Das v. Fazal*, A. I. R. 1929 Lah. 89 : 110 I. C. 305.

(5) *Seth Radha Kishan v. Bing Raj*, 12 P. R. 1910 : 5 I. C. 806.

History and analogous law.—This is section 27 (a) of the Act III of 1907. This corresponds to S. 31, P-t. I. A., S. 3 (15), B. A., 1883, and S. 16 (16), B. A., 1914. The language in the English sections is a bit different but in substance they are the same as the present section. Under those Acts the terms of the composition can be enforced by the court on application by an interested person. There is no such provision in the Provincial Insolvency Act. If default is made in payment of any instalment due in the pursuance of any composition or scheme the court can exercise the power of re-adjudging the debtor insolvent. It is true that the power to re-adjudge the debtor insolvent is discretionary but at the same time it has no other alternative for penalising the debtor for non-compliance with the terms of the composition or the scheme. S. 40.

Scope.—The court may re-adjudge the debtor insolvent when any of the following circumstances are proved to exist :—

(a) the default is made in payment of any instalment due in pursuance of any composition or scheme ;

(b) the composition or the scheme cannot proceed without injustice or undue delay ; or

(c) the approval of the court for the composition was obtained by fraud.

Even if any one of the above circumstances is proved, the court is not bound to act under the section, as the power so conferred is discretionary. The court will not, in the absence of fraud, exercise this power if it is not for the benefit of the creditors (1).

Death of insolvent after approval of composition or scheme.—

Where a scheme has been approved and the order of the adjudication is annulled and the debtor dies subsequently, any person interested has a *locus standi* to apply for the re-adjudication of the debtor for the purpose of further administration in insolvency of the deceased debtor's estate (2).

Debts contracted before date of re-adjudication.—Debts contracted by the insolvent after the annulment of his adjudication under section 39 and before his re-adjudication under section 40 are provable in insolvency to the same extent as if they were provable in the previous proceedings.

Relation back.—Re-adjudication after annulment of composition does not relate back to and takes effect from the date of the presentation of the petition (3). Section 28 (7) does not apply to such re-adjudication.

Liability of surety after annulment or composition or scheme.—

Where a composition or scheme is annulled and the debtor is adjudged insolvent, the liability of the surety who had covenanted to pay under the composition comes to an end and he cannot be sued upon that covenant (4).

(1) *Exp. Moon*, 1887, 19 Q. B. D. 639; *Re Krishna Kishore Adhicary*, 54 Cal. 650 : 105 I. C. 90 : A. I. R. 1928 Cal. 21.

(2) *Re Krishna Kishore Adhicary supra*.

(3) *Re McHenry*, (1888) 21 Q. B. D. 580.

(4) *Govind Das Pity v. Jardine Skinner & Co.*, 18 I. C. 849 : A. I. R. 1924 Cal. 176.

Discharge.

. 41. 41. (1) A debtor may, at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

(2) Subject to the provisions of this section the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

- (a) grant or refuse an absolute order of discharge ; or
- (b) suspend the operation of the order for a specified time ; or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

History.—The section corresponds to section 44 (1) (2) of the Act III of 1907. Sub-section (3) of the old section has now been separated into another section, namely, section 42.

Analogous law—The corresponding section of the Presidency-towns Insolvency Act is 38. It runs as follows :—

“(1) An insolvent may, at any time after the order of adjudication, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but, save where the public examination of the insolvent has been dispensed with under the provisions of this Act, the application shall not be heard until after such examination has been concluded. The application shall be heard in open Court.

“(2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent's conduct and affairs and, subject to the provisions of section 39, may :—

- “(a) grant or refuse an absolute order of discharge, or
- “(b) suspend the operation of the order for a specified time, or
- “(c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.”

The corresponding provision in Bankruptcy Act, 1914, as it stood after the Bankruptcy (Amendment) Act, 1926, was section 26, sub-sections (1) and (2), excepting the proviso to sub-section (2). The law under the Presidency-towns Insolvency and Bankruptcy Acts is the same.

The law under the present Act is different from that under the Presidency-towns Insolvency Act and Bankruptcy Act, 1914, in the following particulars :— S. 41.

1. Under S. 41, P. I. A., 1920, the insolvent must apply for his discharge within the period specified by the court under section 27 of the Act. There is no such limitation under English law.

2. It is expressly provided by S. 38, P-t. I. A. and S. 26, B. A., 1914, that the application for discharge shall not be heard until after the conclusion of the public examination of the insolvent. There is no similar provision in the present Act, but the same practice prevails.

3. It is expressly provided in the Presidency towns Insolvency Act that the application shall be heard in open court. The same practice, though not so provided, prevails in district courts.

4. Under both the Acts, the court has to take into consideration the report of the official assignee or receiver. Though it is not prescribed in the present Act as to the matters with which the report shall specifically deal, except so far as provided in section 42, the court ordinarily calls for a report which covers the insolvent's conduct and affairs generally.

Time for applying for discharge—The wording of section 41 shows that it is open to the insolvent to apply for his discharge at any time after the order of adjudication, subject to the condition that it is obligatory for him to make an application in the first instance within such time as may have been fixed by the court at the outset (1). Where time has not been stated by the court in its order of adjudication, but is added at the foot of the order as an addendum, it cannot be considered a part of the order, and the court should not pass an order annulling the adjudication on the insolvent's failure to apply for his discharge within the period so fixed, as in such a case it is open to the insolvent to apply at any time (2).

Notice to creditors.—Notice of the time and place of the hearing of the application must be given in the manner prescribed by the rules. The rules also prescribe the persons to whom notice is to be given. Some rules provide that the notice should be given only to such creditors as have proved their debts, while others provide for notice to all creditors who have filed their claims. That a notice to creditors is necessary appears to be evident from sub-section (2), which provides that the court shall consider the objections of a creditor.

Report of the receiver.—There is no section in the Act imposing a duty upon the receiver to make a report, but section 42 clearly contemplates that at the time of hearing the application for discharge the court shall have before it the report of the receiver. It is provided by some of the High Courts under the rules made by them that the receiver shall make a report (3). At any rate, there is no bar to the court calling a report from the receiver on the insolvent's conduct and affairs (4). For the

(1) *Ladha Ram v. Prabh Dial*, 132 I. C. 525 (1); A. I. R. 1931 Lah. 672; *Anjobali v. Mohamad Ali*, 105 I. C. 912; A. I. R. 1927 Oudh 506; 2 Luck 757.

(2) *Firm Dayal Singh v. Narmal Das*, 92 I. C. 235; A. I. R. 1926 Lah. 24.

(3) Madras rule 16 and Bombay rule 17.

(4) *Mon Mohan Roy v. Hemant Kumar Mookherjee*, A. I. R. 1916 Cal. 174; 23 C. L. J. 553.

41 evidentiary value of the receiver's report see commentary under section 42
 41).

Sub-section 2, scope.—When an application for discharge is made under the first sub-section, the court may pass any one of the orders mentioned in clauses (a), (b) and (c) of the second sub-section. Subject to the limits prescribed by these clauses, the matter has been left to the absolute discretion of the court. Another limitation is prescribed by section 42, which mentions cases where the court is bound to refuse an absolute order of discharge to the insolvent. It is necessary that an order under the second sub-section should be made exactly within its terms. If it does not, the order is bad in law and should be set aside (1).

The following orders have been held as not coming within the scope of the section :—

1. An order granting an insolvent his discharge subject to his paying Rs. 140 for six months to the official assignee, the first of such payment to be made on 10th March and subsequent payments to be made on the 10th of every subsequent month (2).

2. An order suspending the insolvent's discharge until twelve annas in the rupee are paid (3).

3. An order granting the application conditional on the insolvent furnishing security for the payment of the deferred portion of the dower debt when it became payable and directing that unless he complied with this order proceedings under S. 42, P. I. A., 1907 (S. 69, P. I. A., 1920), should be continued against him (4).

4. An order refusing an insolvent his discharge and at the same time directing him to pay a certain amount to the receiver until he had paid all his debts (5).

5. An order directing the applicant to continue an insolvent and to continue payments until he liquidated the total amount of his debts or could show to the court that he was no longer in a position to make payments (6).

6. An order stating that the insolvent shall remain in a state of bankruptcy until he pays a particular proportion in the rupee (7).

7. An order directing the insolvent to pay fifteen rupees a month and to apply for discharge after one year (8).

(1) *G. C. Moses v. Oakeshott*, 95 I. C. 522 : 30 C. W. N. 518 : A. I. R. 1923 Cal. 794 (case under S. 39, P. I. A., 1907) ; *Bhola Ram v. Sohan Singh*, A. I. R. 1935 Rang. 200 : 13 Rang. 355 : 156 I. C. 982.

(2) *G. C. Moses v. Oakeshott supra*.

(3) *Bhola Ram v. Sohan Singh supra*.

(4) *Mirza Ali v. Mst. Qadari Khanam*, A. I. R. 1919 Lah. 139 : 50 I. C. 774.

(5) *Ram Prasad Lohar v. Ramjee Marwari*, A. I. R. 1930 Rang. 236 : 126 I. C. 529.

(6) *Nand Lal Mukarjee v. Girdhari Lall*, A. I. R. 1928 Oudh 263 : 109 I. C. 633 : 3 Luck 588.

(7) *Ramzan v. Mela Ram*, 122 I. C. 112 : A. I. R. 1929 Lah. 461 ; *Ganga Ram v. Amarnath*, A. I. R. 1937 Lah. 304.

(8) *Khial Das v. Nazir of the Sub-civil Court, Shikarpur*, 144 I. C. 247 : A. I. R. 1933 Sind 191 (1).

8. An order granting discharge subject to the direction that he should include all proved but undischarged debts in his application under the U. P. Encumbered Estates Act (1). S. 4
(2).

Absolute order of discharge.—An order of discharge which is to take effect immediately and to which no conditions are attached is an absolute order of discharge, otherwise called an immediate unconditional order of discharge. An immediate unconditional order of discharge is to be distinguished from an order of discharge granted subject to conditions as to payments out of the insolvent's future earnings. Such a discharge also is immediate but it is conditional. The court is bound to refuse to grant an absolute order of discharge if any of the facts mentioned in section 42(1) are proved. In those cases the court cannot pass an order of absolute discharge but it may pass an order under clause (b) of sub-section (2). Under clause (b) the court is required only to suspend the operation of the order of discharge for a specified time. The time may be one day, one year or five years. Thus what appears to be a limitation on the court's power is really a very nominal limitation. In the last resort the Act leaves the matter in the discretion of the court. Where the court finds that the insolvent is not entitled to an absolute discharge it should consider whether the insolvent is entitled to a conditional one. In a case the insolvent was a young man of twenty years and was carrying on business with his father under the latter's direction and control. The trial court granted an absolute discharge, but on appeal a conditional discharge was only granted (2). An order of conditional discharge is suitable in most cases and the cases of refusal of discharge unconditionally for ever are rare (3).

Discretion of Court—The discretion conferred by this section on the court is a judicial discretion and is to be exercised according to fixed principles. The principles on which an order of discharge should be granted or postponed were set out by Lord Justice Vaughan Williams in the English case of *Gaskell*, in re *Gaskell ex parte*, (4) :—

"After all, the overriding intention of the legislature in all Bankruptcy Acts is that the debtor, on giving up the whole of the property, shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he is to give up everything he has and on doing that he is to be made a free man."

A debtor's discharge should be postponed only if there is any expectation of his receiving a larger income than that which is necessary for his support in his position of life (5). Ordinarily when an insolvent in India, whose case is governed by the provisions of the

(1) *Sheikh Haarb-ur-Ruhman v. Nur-ul-Hasan Khan*, A. I. R. 1937 Oudh 450.

(2) *Budha Mal v. Amar Nath*, A. I. R. 1936 Lah. 381.

(3) *Fazal Din v. Nathu Mal*, A. I. R. 1934 Lah. 159; 148 I. C. 171; *Bhag Mal v. Parshotam Singh*, 160 I. C. 529; A. I. R. 1935 Lah. 919.

(4) 1904, 2 K. B. 478.

(5) *Gaskell, in re Gaskell, ex parte supra* (the insolvent was an officer of the army); *G. L. Sita Ram v. R. M. Redden*, A. I. R. 1926 Cal. 529; 91 I. C. 760. (The insolvent was a guard in the railway.); *Mool Chand v. Official Receiver, Aligarh*, A. I. R. 1930 All. 471 (2); 52 All. 385; 127 I. C. 410.

- 41 1). Act, has paid up eight annas in the rupee, he is entitled to be free from the disability of an insolvent unless it is established that his case falls under the provisions of section 42 (b) to (i). The removal of his disability as an insolvent need not be accompanied by an absolute acquittance in respect of the liability which he has not discharged (1).

The exercise of its discretion by the trial court will not be readily overruled (2); but if the court takes a wrong view of the facts and thereupon exercises its discretion, the court of appeal will vary the decision and exercise its own discretion as to the proper amount of punishment to be inflicted (3).

The question whether the court would have exercised its discretion in one manner rather than another is not one which can properly be raised in revision (4).

Matters to be considered by the court.—Before making the order the court must take into consideration the report of the official assignee or receiver in regard to the insolvent's conduct and affairs. It is also necessary that before the court passes an order of final discharge it is to be satisfied of the facts which are to be found in section 42. The interests of both the debtor and the creditors should be considered. The intention of the legislature is that the debtor, on giving up the whole of his property, shall be a free man able to earn his livelihood. At the same time the civil rights of the creditors must not be forgotten in such a case and conditional orders of discharge should be made as far as reasonable for the benefit of the creditors (5). What is exactly just to both parties is a matter difficult to determine (6). In considering the question of an insolvent's discharge the court is bound to have regard to the conduct of the insolvent which resulted in his bankruptcy as well as his conduct during the insolvency proceedings. The court may properly refuse the discharge where the bankrupt has been guilty of gross misconduct as a trader (7). The discharge shall also be refused if the debtor's conduct in relation to the bankruptcy has been such as to induce the court to impose any conditions (8).

Conduct and affairs which the court is to consider at the time of discharge are not confined to the facts that are specified in section 42, but include anything which has to do with the bankruptcy. They,

(1) *Nand Lal v. Girdhari Lal*, A. I. R. 1928 Oudh 263 : 3 Luck 581 : 109 I. C. 633.

(2) *Re Chase*, 3 Mor. 228; *Re Shaw*, 1917, 2 K. B. 734; *Muttu Muham-mado v. Ramaswamy Chetty*, 148 I. C. 858; A. I. R. 1934 P. C. 1.

(3) *Ex parte Castle Mail Packet Company*, 18 Q. B. D. 154, *Re Rankin*, 5 Mor. 23; *Re Sultzberger*, 4 Mor. 82; *Re Freeman*, 7 Mor. 38; 62 L. T. 367; *Re Nicholas*, 7 Mor. 54; *Re Stainton*, 19 Q. B. D. 182 : 4 Mor. 242; *Re Shackleton*, 6 Mor. 304; *Re Swabei*, 76 L. T. 531; *Re Dalze*, 16 Mans. 263.

(4) *Ladha Ram v. Prabh Dayal*, 132 I. C. 525 (1) : A. I. R. 1931 Lah. 672.

(5) *Mahomed Ali Akbar v. Mst. Fatima Begum*, A. I. R. 1931 Lah. 591 : 133 I. C. 553.

(6) *Mahomed Ali Akbar v. Mst. Fatima Begum*, A. I. R. 1931 Lah. 591 : 133 I. C. 553.

(7) *Re Badcock*, 3 Mor. 138.

(8) *Re Barker*, 25 Q. B. D. 285.

S. 41
(2).

however, do not include conduct which can never have had anything to do with the bankruptcy, either to produce it or to affect the proceedings. "Conduct outside the bankruptcy" cannot be taken into consideration. Thus it has been held that the refusal of the bankrupt to submit to a medical examination so as to enable the trustee to insure his life is no ground for refusing or suspending his discharge (1). Similarly a judgment against an insolvent for breach of a promise of marriage which occurred several years before the insolvency and which had no connection with the insolvency ought not to be taken into consideration; but, where such a judgment for non-payment of damages under it produces the insolvency, the insolvent's conduct in respect of the breach of the promise of marriage should be taken into consideration (2).

In considering the insolvent's conduct during the insolvency proceedings the court should regard the duties imposed upon the insolvent by the Act as to the realisation and distribution of his property. In this connection, see section 28 (1). Thus where an insolvent's assets were not of a value equal to eight annas in the rupee and the insolvent, far from helping the receiver to pay his debts, obstructed him, it was held that it was improper to grant him a discharge (3). Along with the consideration of the interests of the insolvent and the creditors and the insolvent's conduct and affairs generally, the court should also have regard to the interests of the public and of commercial morality (4). The question whether an insolvent is to obtain his discharge or not is always one which affects the interests of the public. The fact that the bankruptcy offence committed by the debtor has been condoned by the injured party is immaterial (5).

The court in insolvency proceedings suspended the discharge of an insolvent, who had put up eighteen years' service in the Posts and Telegraphs, for a period of two years, and in the meantime made an appropriation order out of his salary, thus making the insolvent pay without difficulty something like eight annas in the rupee. The insolvent paid regularly for some time when he was informed by a memorandum from the Postmaster-General to obtain complete discharge within six months. It was held that the court must administer the Act in accordance with the law and that the order made was a proper order (6). The power to make appropriation order is one of those administrative powers, with which the insolvency court is entrusted, with a view to secure for the creditors repayment of some part of their debts. The mere making of an adjudication or an appropriation order should not be regarded, apart from the merits of the particular case, as a signal for the automatic dismissal of the insolvent if he happens to be an employee (7).

(1) *Re Barker*, 25 Q.B.D. 285, affirmed *sub nom Board of Trade v. Block*, 13 App. Cas. 517.

(2) *Re Barker*, 25 Q. B. D. 285; *Re Cook*, 1889, 6 Mor. 224 : 61 L. T. 335.

(3) *Jagmohan Singh v. Deputy Commissioner, Fyzabad*, 80 I. C. 54 : A. I. R. 1925 Oudh 112.

(4) *Re Badcock*, 3 Mor. 138.

(5) *Re Stanton*, 1887, 19 Q. B. D. 182 : 4 Mor. 242.

(6) In the matter of Mahomed Ismail, A. I. R. 1937 Rang. 14.

(7) In the matter of Thota Kama-Raj Naidu, A. I. R. 1937 Rang. 22.

41
2).

Suspension of discharge.—An order of discharge whose operation is suspended for a limited period is suitable in those cases where the court thinks that an absolute order of discharge should not be granted. At the time of suspending the discharge the court can, concurrently with it, attach conditions to it. This power of concurrently suspending the discharge and attaching conditions to it is suitable in most cases (1). It is a very common method by which the court punishes insolvency offences. The period of suspension is left in the absolute discretion of the court. It might suspend the discharge for only one day and the practical effect of such an order would be the same as an immediate absolute order. By S. 26, B. A., 1914, as it stood before the amendment of 1926, the law was that if any fact other than or in addition to the "assets fact" was proved, the court was bound to suspend the discharge for not less than two years. This fetter on the court's discretion was removed by the Act of 1926. Where the only offence committed by the bankrupt was that twenty-three years prior to his bankruptcy he had made a statutory arrangement with his creditors, the discharge was nominally suspended for one day (2). The general practice of the court is, however, not to grant the discharge on second bankruptcy until the earlier bankruptcy has been closed (3). Suspension of discharge for three months or six months is too mild a punishment and, although it cannot be said that there are no cases in which a suspension for those periods cannot be justifiable, it is the duty of the court to take a sufficiently serious view of the offences which bankrupts from time to time commit, and to show by the punishment awarded that such offences cannot be committed with impunity (4). The insolvency laws are devised for the protection of the distressed debtors and not for the purpose of enabling reckless and imprudent persons to incur with relative impunity obligations which they cannot perform. Where an insolvent, although fortunate enough in obtaining an unconditional discharge in a previous application for insolvency in spite of his assets being almost nil and there being a finding that his debts were contracted recklessly, again presents a second application for insolvency within a period of twenty-eight months and it is again found that he has incurred his debts recklessly, it is a case in which it is the duty of the insolvency court to refuse a discharge (5). Where the case is not of an aggravated nature an excessive penalty is generally improper, specially where the bankrupt is not a trader (6).

After the expiry of the period of suspension the order of discharge operates of itself an unconditional order from that date. The passing of a final order is not necessary (7); nor an application for an order of final discharge by the insolvent on the expiry of the specified time is necessary. And even if such an application is made by the insolvent, notice to the creditors is not necessary (8). In an insolvency proceeding the order passed was: "It is useless to carry on this insolvency any longer, and it

(1) *Fazal Din v. Nathu Mal*, A. I. R. 1934 Lah. 109 : 143 I. C. 971 ; *Bhag Mal v. Parshotam Singh*, 160 I. C. 520 : A. I. R. 1935 Lah. 919.

(2) *Re Sultzberger*, 1837, 4 Mor. 82.

(3) *Re Banko*, 2 Mor. 45 ; *Re Davis*, 26 T. L. R. 458.

(4) *Re Freeman*, 1890, 7 Mor. 38 : 62 T. T. 367.

(5) *In the matter of Maung Tun Ayea*, A. I. R. 1936 Rang. 412.

(6) *Re Rankin*, 888, 5 Mor. 23.

(7) *Murad Ali Shamji v. B. N. Lamb*, A. I. R. 1920 Bom. 419 : 44 Bom. 555 : 21 B. L. R. 980.

(8) *Tar Mahomed-Vally Mahomed v. Adamjee Hoosain*, 183 I. C. 721 : A. I. R. 1931 Rang. 188.

does not appear that the insolvent is to blame. His offer to pay instalments has been refused by the chief creditor and so a composition is not possible. The property mentioned by the insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written." The property was sold and an order was passed stating that the property having been sold the proceeds should be distributed at once. It was held that the first order was an order of absolute discharge which was suspended for a specified time, that is, until the property had been sold, and that the insolvency proceedings terminated with the second order (1).

S. 41
(2).

Discharge subject to conditions.—Under clause (c) the court may pass an order of discharge subject to conditions as regards the after-acquired property of the insolvent for the payment of the insolvent's debts (2). An order of discharge subject to the condition that the insolvent shall hand over to the receiver all the assets which he might inherit from his father is good. The possibility of the insolvent's father not dying for a long time or not leaving any property for his son is no ground for making the discharge unconditional (3). The power given by the clause ought not to be exercised in such a manner as to make such a condition tantamount to one of absolute refusal of discharge (4). An order of discharge is none the less a discharge because conditions are attached to it. An order of discharge may not have the effect of wiping out all the debts of the insolvent yet the insolvent is a discharged insolvent and is a qualified voter under the U. P. Municipalities Act (5).

Fresh application for discharge.—Ordinarily no second application for discharge by the insolvent is contemplated by law, the first application being sufficient. In a special case a fresh application may, however, be made. He is not absolutely precluded from making a further application for discharge when his previous application has been refused, and so remain undischarged for life (6). In a Sind case, decided under the Act 3 of 1907, it was held that when the first application for discharge was refused a second application could not be made. It was there held that no court has an inherent power to set aside an order, unless such power is expressly given by the statute, and that there was no provision in the Act enabling the court to set aside or vary any order made by it in its insolvency jurisdiction (7). The case is, however, different where upon the hearing of an application for discharge the judge is of opinion that the applicant is not entitled to an immediate unconditional discharge and

(1) *Mool Chand v. Dip Chand*, A. I. R. 1935 All. 272: 153 I. C. 869.

(2) *Firm of Prayag Shah Sahab Ram v. Dwijapada Roy*, 138 I. C. 745 : A. I. R. 1932 Cal. 623.

(3) *Abdul Jabbar v. Din Mohammad*, 153 I. C. 144 : A. I. R. 1934 Lah. 659 (1).

(4) *Re James*, 1891, 8 Morr. 19.

(5) *Parmeshwari Das v. Municipal Board, Bareilly*, A.I.R. 1932 All. 58 : 133 I. C. 909.

(6) *Gopal Nayar v. K. Gopalam*, 91 I. C. 31 : A. I. R. 1925 Mad. 915 F. B. (There is only an expression of opinion ; the point did not actually arise for decision.) ; *Velayutha Nadar v. Subramania Pillai*, 109 I. C. 636 : A. I. R. 1928 Mad. 609 ; *Mul Chand v. Official Receiver, Aligarh*, 124 I. C. 410 : A. I. R. 1930 All. 471 (2) : 52 All 385 ; *Karim Mian*, in the matter of, 132 I. C. 640 : A. I. R. 1931 Cal. 392 ; *Tan Siek Ke v. C. A. M. C. T. Firm*, A. I. R. 1928 Rang 109 : 6 Rang 27 : 100 I. C. 769 ; *Nur Din v. Amar Nath*, A. I. R. 1932 Lah. 478 : 133 I. C. 33.

(7) *In Re Henry Robert Smith*, 32 I. C. 575 : A. I. R. 1916 Sind 70.

1. also feels himself unable to fix a period of suspension ; he may in refusing to grant a discharge reserve liberty to the insolvent to apply again and if he does so the insolvent may apply again in pursuance of the leave so reserved as a matter of right. There is no such right to apply again where the discharge has been refused absolutely (1). These cases were decided under the Act of 1883 which did not contain the proviso which now exists in section 26, sub-section (2) (iv) of the Act of 1914. The proviso runs as follows :—

“Provided that, if at any time after the expiration of two years from the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such an order, the court may modify the terms of the order or of any substituted order, in such manner and upon such conditions as it may think fit.”

Section 104 of the Act of 1883, corresponding to section 108 of the Act of 1914, however, conferred very wide powers of review and hearing. The joint effect of the absence of the proviso and the existence of section 104 was that the insolvent had no right to make a second application for discharge but he could apply for the review of the first order. Although there was power to refuse a discharge with liberty to the bankrupt to apply again, a more convenient procedure was to refuse it altogether and use the power of rehearing (2). S. 8 (1), P-t. I. A, corresponds to S. 108 (1), B. A., 1914, and the court has power under that section to review, rescind or vary any order made by it. Its section 42 (1) also contains an express provision that where the discharge is refused the court may, after such time and in such circumstances as may be prescribed by the rules, permit the insolvent to renew his application. These provisions are not reproduced in the Provincial Insolvency Act, but the power of review conferred by O. 47, R. 1, C. P. C. is available by virtue of section 5. Notwithstanding the omission of these provisions in the Act, we have seen that a second application has been held to lie.

Effect of an order of discharge on insolvency proceedings.—An order under section 41 does not necessarily put an end to the proceedings in the insolvency (3). The contrary was held in a Rangoon case (4), which must be considered as bad law. A conditional order of discharge does not debar a creditor from proving his debt in insolvency. A creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties (5). The mere fact that proceedings started by or against the receiver are pending is no ground for refusing discharge to the insolvent. The reason is that the order of discharge does not terminate the proceedings and the court can make

(1) *Re Tobias & Co.*, 1891, 1 Q. B. 463 ; *Re James*, 1891, 8 Mor 19.

(2) *Re Tobias*, 8 Morr. 30 ; *Re Shields*, 106 L. T. 345.

(3) *K. P. S. P. L. Firm v. C. A. P. C. Firm*, 117 I. C. 582 : 7 Rang 126 ; A. I. R. 1929 Rang 168 ; *Rowe & Co. v. Tan Thien Taik*, A. I. R. 1925 Rang. 105 : 2 Rang. 643 : 84 I. C. 909 ; *Tan Siek Ke v. C. A. M. C. T. Firm*, A. I. R. 1928 Rang 109 : 6 Rang. 27 : 103 I. C. 762.

(4) *Maung Po Toke v. Maung Po Gyi*, A. I. R. 1926 Rang. 2 : 3 Rang. 492 : 92 I. C. 142.

(5) *Babu Lal Sahu v. Krishna Prasad*, 85 I. C. 543 : 4 Patna 28 : A. I. R. 1925 Patna 433. See also commentary under section 34.

order in regard to his property (1). In a Lahore case, it was held that where the insolvent dies after adjudication but before obtaining his discharge, there is an automatic discharge of the insolvent by his death, and where the property has been distributed prior to his death, the proceedings must automatically be held as terminated (2). If the case holds that the proceedings terminate on discharge its authority is doubtful, but it is correct so far as it holds that the insolvency of the deceased person terminates as soon as the distribution of his property is complete. In a subsequent Lahore case, where the debtor was declared insolvent after his debt and his minor son was brought on record, it was held that the minor son could ask the court for a discharge (3).

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Appeal.—An appeal lies against an order on an application for discharge under section 75 (2), Schedule I.

Withdrawal of application.—An application for discharge may be withdrawn by leave of the court (4).

Cases in which Court must refuse an absolute discharge. **42.** (1) The Court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts, namely :—

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible ;
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ;
- (c) that the insolvent has continued to trade after knowing himself to be insolvent ;
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden

(1) *Ram Chand v. Mohra Shah*, 135 I. C. 511 (2) : A. I. R. 1931 Lah.

(2) *Asa Nand v. Bishan Singh*, A. I. R. 1933 Lah. 937 : 147 I. C. 695.

(3) *Nanak Chand v. Official Receiver*, A. I. R. 1935 Lah. 935 : 160 I. C.

(4) *Re Wallis*, 8 Mor 110.

2. of proving which shall lie on him) that he would be able to pay it;
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;
 - (f) that the insolvent has brought on, or contributed to, his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs ;
 - (g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors ;
 - (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors ;
 - (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust.

(2) For the purposes of this section, the report of the receiver shall be deemed to be evidence ; and the Court may presume the correctness of any statement contained therein.

(3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently.

History.—Sub-sections (1), (2) and (3) of the present Act reproduce the corresponding sub-sections (3), (4) and (5) of section 44, P. I. A., 1907. The section is based on the English Acts.

Analogous Law.—The corresponding provisions of the Presidency-towns Insolvency Act and the British Acts are section 39, section 8 (2) to (7) of the Act of 1890, and section 26 (2) to (5) of the Act of 1914, as amended by the Bankruptcy (Amendment) Act, 1926. Under the Presidency-towns Insolvency Act, the court is bound to refuse an absolute order of discharge, in addition to the facts mentioned in S. 42, P. I. A., 1920, in those cases where the bankrupt has committed any offence under that Act or under sections 421 to 424 of the Indian Penal Code. Under that Act the court can as a condition of discharge require the bankrupt to consent to a judgment being entered against him by the official assignee or trustee for any balance or part of any balance of the debts provable under the bankruptcy, which is not satisfied on the date of discharge, such

balance to be paid out of the future earnings or after-acquired property of the bankrupt. The law under the Presidency-towns Insolvency Act differs from the English law in that under the former the court shall refuse the discharge absolutely in all cases where the insolvent has committed an offence but under the latter Act the court is bound only to refuse an absolute order of discharge and it may grant an absolute order of discharge, suspended for a time or subject to conditions. The first part of S. 39 P-t. I. A., which makes it imperative on the court to refuse a discharge in those cases where the insolvent has committed the offences mentioned in it is based on section 28, Bankruptcy Act, 1883. That section was replaced by section 8, Bankruptcy Act, 1890. It provided that the court must refuse the discharge in cases where the bankrupt has committed any felony or any misdemeanour unless for special reasons the court otherwise determines. Section 8 of the Act of 1890 was reproduced, with certain changes, in S. 26, B. A., 1914. Section 26 was subsequently amended by the Bankruptcy (Amendment) Act, 1926. As a result of the amendment there is now no case in the English law in which the court is bound absolutely to refuse an order of discharge. The same was the law under Bankruptcy Act, 1869. The provisions of Act 3 of 1907, as well as that of the present Act, are in this respect on the lines of the Act of 1869. S. 42.

Object and scope.—The object of the present section is to discriminate between honest and dishonest insolvents. The object of the insolvency laws is intended to serve a twofold purpose. One is that a trader who suffers losses through misfortune or causes beyond his control and thus incurs liabilities, should not continue to be burdened with those liabilities for all his life. It is desirable that such a person, on giving up his all for the payment of the creditors, should be a free man again, with liberty and natural inducements to earn his living. At the same time the insolvency laws are directed to prevent a trader from dealing with borrowed money in an extravagant, reckless and dishonest manner. Under the section the court is required, before granting a discharge, to satisfy itself that the facts mentioned therein exist in any particular case or not. The benefit of insolvency Acts is intended for traders and others who act honestly and straightforwardly according to the recognised proper mode essential to their position, but who through misfortune incur losses. The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly or who contract debts recklessly without any reasonable prospect of being able to pay them (1).

Onus of proving such facts—Proof of these matters seems to lie on those who oppose the order of discharge (2). Where, however, the insolvent's assets are proved by the creditors to be of a value equal to less than eight annas in the rupee on the amount of his unsecured liabilities, the burden of proof is shifted on the insolvent to prove that the insufficiency of the assets has arisen from circumstances for which he cannot justly be held responsible (3). Under sub-section (2) the receiver's report is made *prima facie* evidence of the statements therein (4). Thus where the report is in favour of the creditors, it is for the insolvent to prove that he is entitled to a discharge.

(1) S. R. M. C. P. Chetti v. Ko Aung Gyi, 36 Mad. 373 : 15 I. C. 376 ; Kalleappa Chetti v. Maung Kywe, 9 I. C. 950.

(2) William's Bankruptcy Practice, 14th Edition, page 123.

(3) Ladha Ram v. Prabh Dial, 132 I. C. 525 (1) : A. I. R. 1931 Lah. 672.

(4) Also see *Re Vaun Laun*, 14 Mans 281. -

42. **Sub-section (1)(a).—** In clause (a) we have what is generally called the "assets fact." Under the Act of 1869, section 47, the court could not grant a discharge without the assent of the creditors, unless the bankrupt's estate yielded ten shillings in the pound, or might have done so but for the negligence or fraud of the trustees. The present law of the Bankruptcy Act, 1914, also makes the absence of assets equal to ten shillings in the pound on the unsecured liabilities one of the facts which will prevent the deb or from obtaining an immediate unconditional discharge. But the matter of discharge is now independent of the assent of the creditors. The burden of proving insufficiency of assets is on the opposing creditors (1) and the court should satisfy itself on that score. Merely stating in the order that there is nothing in the report of the receiver to stand in the way of the insolvent's discharge is not sufficient. The judge must satisfy himself that the assets were not of the requisite value from circumstances for which the insolvent could not be held justly responsible. The order is not legal in the absence of such a finding (2). Inasmuch as the dividend can only be calculated upon the amount of an admitted proof, the official assignee is bound, in the case of each creditor who has proved, to look to the amount of his proof and to nothing else, notwithstanding that the creditor's name may have appeared in the schedule for a larger sum (3). Where it is clear that the bankrupt is not paying a sum equal to eight annas in the rupee on the amount of his unsecured liabilities, the onus is upon him to show in the first instance that it happened from circumstances beyond his control. It is not necessary that his creditors should show in the first instance that the insolvent is guilty of fraud or dishonesty (4). Where no evidence to discharge the onus is given, the court has no jurisdiction to pass an order of discharge (5). The same will be the case where the insolvent fails to prove to the satisfaction of the court that his liabilities arose out of circumstances for which he could not justly be held responsible (6). The mere fact that the insolvent was unsuccessful in his trade which ended in loss is not sufficient to hold that it arose from circumstances for which he could not justly be held responsible (7). Where a very small fraction of the amount due to the unsecured creditors was paid from the amount realised by the sale of the estate of the insolvent and where he was found guilty of excessive expenditure on deaths and marriages only, an absolute discharge was refused but the case was remanded to the lower court for inquiry as to whether a conditional order of discharge could be made in the circumstances (8). If a person enters the trade possessing no property

(1) *Re Van Laun*, 14 Mans. 281.

(2) *P. N Datt Chaudhury v. J. H. Blades*, 115 I. C. 585 : A. I. R. 1928 Cal. 843.

(3) *In the matter of J. T. X. Langford*, A. I. R. 1936 Rang. 190.

(4) *Fazal Din v. Nathu Mal*, A. I. R. 1934 Lah. 103 : 148 I. C. 971.

(5) *Santi Lal v. Raj Narain*, 119 I. C. 4 : A. I. R. 1929 All. 858.

(6) *Brij Mohan v. Sarju*, 134 I. C. 607 (1) : A. I. R. 1931 Oudh. 356 (1) ; *Tara Singh v. Sarmukh Singh*, 146 I. C. 532 : A. I. R. 1933 Lah. 812 ; *Bakram v. Kawdu*, A. I. R. 1936 Nag. 17 ; *Bakram Bapuji v. Mangalaya Adque Teli*, A. I. R. 1937 Nag. 37. The court appears to have assumed that the onus is on the creditor in *Surajpal Singh v. Shiv Lal*, 119 I. C. 16 : 1929 All. 943.

(7) *Firm of Prayag Shaha v. Dwija Pada Roy*, 138 I. C. 745 : A. I. R. 1932 Lah. 623.

(8) *Devi Dayal v. Sarmukh Singh*, 117 I. C. 632 : A. I. R. 1929 Lah. 281.

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and relying entirely on making the profit in order to repay what he borrows for the trading, interest on that, and to provide for himself and his family, it cannot be said that he is not justly responsible for his debts if a loss instead of a profit is the result of the trading. If a man borrows money, he is responsible for the payment of it. Whether the man who lends the money is foolish or otherwise in lending it is immaterial (1). Where the insolvent's inability to pay his unsecured creditors eight annas in the rupee is found to be due to causes directly under his control, that is a reason for refusing to grant an absolute discharge (2). An insolvent should, however, ordinarily be granted his discharge on payment of eight annas in the rupee (3). The mere fact that the insolvent is a young man of twenty years of age and was carrying on business with his father who had its direction and control, is not enough to grant an absolute discharge (4). The statement of the insolvent to the effect that the debts were not contracted by him but by his father, even if it is false, is no good ground admissible for the proof upon which the order of discharge can be refused. Similarly no adverse inference of fraud can be drawn from the fact as to how the insolvent could get large amount of credits (5).

Meaning of assets.—Section 26 (5), B. A., 1914, runs as follows :—

“For the purposes of this section, a bankrupt's assets shall be deemed of a value equal to ten shillings in the pound on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realised, or is likely to realise, or with due care in realization, might have realised an amount equal to ten shillings in the pound on his unsecured liabilities, and a report by the official receiver or the trustee shall be a *prima facie* evidence of the amount of such liabilities.”

This sub-section is not reproduced in the Indian Acts, but the same principle applies. Assets which could be taken into account for determining their value means the realisable property which the insolvent possesses at the material moment. It does not include future earnings which are unsaleable (6).

Clause (b) : omission to keep books of accounts.—Under the English Acts of 1849 and 1869, the omission to keep proper books did not affect the grant of the order unless it was wilful and with intent to conceal the true state of affairs. Now mere omission without fraudulent intent seems to be sufficient to disentitle the bankrupt to an immediate unconditional discharge. The section requires that there should not only be books but they must be properly kept and balanced from time to time so that at any time the real state of affairs may at once appear (7). The books must be so kept that they will show at once the state of the debtor's business and will not require a long and skilled investigation (8); but they need only be kept as regards the business

(1) Kalleappa Chetty v. Maung Kywe, 9 I. C. 950.

(2) Bandi Papan v. Yenuga Narasa Reddy, A. I. R. 1985 Mad. 646 : 156 I. C. 453.

(3) Rashid Ahmad Khan v. Shree Dayal, 1935 A. M. L. J. 96.

(4) Budha Mal v. Amar Nath, 157 I. C. 935 : A. I. R. 1936 Lah. 381.

(5) Doddi Abdul Nabi Sahib v. Kallappa Rajappa, A. I. R. 1936 Mad. 800 (assets were of the requisite value in this case).

(6) Devi Prasad v. Allen Grant, 30 I. C. 916 : A. I. R. 1917 All. 435.

(7) Re Smart, 1 Fonb. 14.

(8) Evans, Dodd and Bowen 17 Q. B. D. 244.

42 carried on by the debtor and so as to show his financial position in such business (1). The object of this clause is, firstly, that his financial position within the three years immediately preceding his insolvency may be disclosed in a sufficiently clear and easy manner; and, secondly, it is to force upon the insolvent trader the contemplation of his own position and to deprive him of being able to make the excuse, "True, I carried on my business after I ceased to be insolvent but in fact I was not aware that that was so" (2). If a transaction is an isolated transaction not intended to be repeated, it will not amount to carrying on a business, which expression in general involves transactions from time to time. If, however, a transaction, which is a first transaction, is one which if repeated would be a transaction in the business and if it is proved that such first transaction was undertaken with the intent that it should be the first of several transactions, and with intent of carrying on the business of which it is a transaction, then the first transaction proved to have been put through with that intent will be a transaction in an existing business; and if it is the first transaction in the business in which it is proper to keep accounts, proper books must be kept from the moment of the beginning of the first transaction (3). An insolvent who has, by his conduct in not keeping proper accounts, shown incapacity to carry on his business should as a rule be refused his discharge with liberty to apply again at a future period if he can show that he has since acquired the knowledge in which he was deficient before (4).

Omission to keep proper books of accounts is a serious offence in insolvency. Under section 69 keeping of false books fraudulently with intent to conceal the state of affairs or to defeat the object of the Act is a criminal offence punishable on conviction with imprisonment which may extend to one year. Omission to keep books of accounts, though it may not be fraudulent, is still serious and the punishment provided by the Act is that his discharge may be withheld. The plea of a business man that he has no books of account raises a presumption that he is wilfully withholding them inasmuch as they show that he has concealed his assets to defeat the claim of his creditors. This is the state of things which the section is intended to prevent and punish by refusing an absolute order of discharge and also by conviction under section 69. It is to be borne in mind, and must always be borne in mind, in dealing with the question of books, even where they are false, or so badly kept, as to amount not merely to negligence but to suggestion of dishonesty, that section 42 itself provides and defines a quasi-offence, with regard to the keeping of accounts, which, if established, is a ground for a kind of penal order, *i. e.*, postponing the absolute discharge of the insolvent when he applies for it (5).

Where the insolvents were not able to produce account books nor did they explain satisfactorily the alleged loss of the books, an absolute order of discharge was refused (6). A solicitor who enters into trade was held bound to keep books as a trader. It was not sufficient that he had kept accounts after the manner of solicitors (7). A ledger is not to be considered

(1) *Re Mutton*, 19 Q. B. D. 102.

(2) *Re Heap*, 1887, 4 Morr. 314.

(3) *Re Griffin*, 1891, 9 Morr. 1 : 60 L. J. K. B. 235.

(4) *Re Freeman*, 1890, 7 Morr. 38 : 62 L. T. 367.

(5) *Ganga Prasad v. Madhuri Saran*, 100 I. C. 555 : A. I. R. 1927 All. 352.

(6) *Tarasingh v. Sarmukhsingh*, 146 I. C. 532 : A. I. R. 1933 Lah. 812.

(7) *Exp. Carter*, 1 Fonb. 83.

to be satisfactorily kept unless the accounts were entered into it continuously according to their priority, with an index and without any intervening blank leaves (1). No certificate would have been granted immediately if there was no cash book (2).

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Clause (c) : continuing to trade after knowing himself to be insolvent.—The meaning of the expression was thus stated by Cave, J., in *Re Stainton* (3), in the following words:—

“A man, of course, has a perfect right, as long as he is solvent, to determine that he will go on with a business, although it may be a losing business. He may trust that, before he becomes insolvent, matters will change, and he will again be in a condition of prosperity. But the moment he becomes insolvent, then he is no longer going on at his own risk in case of failure; he is going on at the risk of his creditors, in case things do not mend, as he hopes they will. In my judgment a man has no right to do that. The moment things have got to such a pitch that he cannot pay twenty shillings in a pound, but he nevertheless thinks that if he goes on he may be able to retrieve his position, in my opinion, he ought to call his creditors together, and leave them, who will have to bear the loss in case his calculations are wrong, to determine whether that course of going on shall be proceeded with or not.”

The above was a case under the Act of 1883. Under the old Acts it was held that a creditor is not bound to leave off trading merely because he was in difficulties, the question being whether he had continued trading after there ceased to be any reasonable prospect of his retrieving himself (4).

Clause (d) : contracting debts without reasonable expectation to pay.—By the express wording of this section the onus is upon the bankrupt to show that when he contracted the debt he had reasonable or probable ground or expectation of being able to pay. The words “without having any reasonable or probable expectation at the time of contracting it” are pointed not at the case of a man who incurs his debts knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt (5). Again, it is the contracting of the debt and not the obtaining of goods, even though he is insolvent at the time, that is within the section (6). If a man contracts debts when he has capital, though that capital, to his knowledge, is not immediately realisable, his case does not come within the clause (7). The clause covers not only a new and original debt, but also a debt in renewal or in substitution for a previously existing debt (8). It is to be noted that the condition of the insolvent’s mind in regard to the existence of his ability to pay has reference to the time when the debt is contracted (9). “It is said the bankrupt systematically lived beyond his income and therefore must have contracted debts without any expectation of being able to pay

(1) *Re Trace*, 1 Fomb. 13.

(2) *Re Sparrow*, 1 Fomb. 69.

(3) 4 Morr. 242.

(4) *Exp. Johnson*, 4 DeG. and S. 25. See also as to continuing to trade *Exp. Dornford*, 4 DeG. and S. 29 and *Exp. Rufford*, 2 DeG. M. and G. 234.

(5) In the matter of the petition of B. Cowie, 1881, 6 Cal. 70.

(6) *Exp. Bayley*, 1867, L. R. 3 Ch. App. 244.

(7) *Re Sharp*, 1893, 10 Morr. 114.

(8) *Re Boulton Bros. & Co.*, 1927, 1 Ch. 69.

(9) *Exp. Mortimore*, 1861, 30 L. J. Bank. 17.

them. But if a man having hundred pounds in hand were to contract debts to that amount, it would be impossible to say that he contracted it without reasonable expectation of being able to pay them. If he then were to contract further debts to the same amount, and apply the hundred pounds in paying them, so as to leave only the earlier debts subsisting, blamable as such conduct would be, I do not think that it could be brought within the provisions of this section, there being no debt provable under his bankruptcy which he had contracted without reasonable expectation of being able to pay it" (1). Where the insolvents carried on very small business, and had borrowed very large sums of money for the purposes of that business, it was held that the insolvents' must have known at the time of contracting debts that they had no reasonable or probable ground for expecting that they would be able to repay them, and that the court was right in not granting an absolute discharge (2).

Clause (e) : failure to account satisfactorily for loss of assets —

As a condition of the insolvent being made free from his debts by an order of discharge the court has to see that he has placed all his assets at the disposal of the court. If there appears to be a loss or deficiency in his assets he is bound to give a satisfactory explanation therefor. In the absence of such an explanation the court will be justified in presuming that there had been loss or removal of assets to defeat the claims of his creditors. The fact that shortly before the insolvency there has been a very large loss or disappearance of assets which the insolvent has failed to account for satisfactorily is a matter which is to be taken into consideration on an application for discharge (3).

Clause (f) : rash and hazardous speculations etc.—Under this clause if the court is satisfied that the insolvency of the insolvent was brought on by the insolvent's own fault, it has to refuse an absolute discharge. The factors contributing to insolvency which the court has to take into consideration are (1) rash and hazardous speculation (2), extravagance in living (3), gambling and (4) culpable neglect of his business affairs.

Rash and hazardous speculations.—Mere speculation does not disentitle an insolvent from asking the court for a discharge under the clause. Speculation must be rash and hazardous to debar an insolvent from claiming his discharge (4). Though it is difficult to give a complete definition of the word 'speculation', yet the word has a definite connotation and meaning about which there can be no mistake. If a man advances his money on that which may succeed or may not, it must be a speculation. When it is a mere chance whether the thing succeeds or not, it is hazardous speculation. An element of risk is involved in every business. The mere fact that the dealings by the insolvent do not turn out well does not necessarily mean that they were rash and hazardous speculations (5). But where the risk is very great as compared to the means of the insolvent or as compared to the possibility of gain, it becomes hazardous. What is hazardous for one man may not be so for another. It was once held that though a speculation turned out very badly, the bankrupt did not come within

(1) *Exp. Breon Dric, Re Calwell*, 1867, Ch. App. 26, *per* Cairns, L. J.

(2) *Tara Singh v. Sarmukh Singh*, A. I. R. 1933 Lah. 812 : 146 I. C. 532.

(3) *Re Jones*, 1890, 24 Q. B. D. 589.

(4) *Shivdev Saran v. Kidar Nath*, A. I. R. 1936 Lah. 840 : 164 I. C. 1087.

(5) *Rashid Ahmad Khan v. Shoe Dayal*, 1935 A. M. L. J. 86.

this section, if, when he entered upon it, he possessed property beyond the amount of his liabilities (1) ; but the trade must not be carried on with borrowed money, the loss of which would render the trader insolvent. The word 'rash' relates to the conduct of the insolvent alone according to his condition and the circumstances and facts of the particular case. 'Rash and hazardous speculation' means such as no reasonable and careful man having regard to all the circumstances of the case would enter into (2). A solicitor in practice who takes another business involving speculation must be considered rash within the meaning of this clause (3). Speculative transactions, though connected with a man's business, may be gambling transactions within the meaning of this clause, where what is intended is to receive or to pay mere differences in price (4). A creditor who relies on speculations as rash or hazardous must specify them so that the court may judge with precision (5).

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Extravagance in living.—As to extravagance in living it was said in *Re Stainton* (6):

"A man is bound not to keep up appearances but to pay his debts, and if his profits will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his state of living and not to go on living out of the money of his creditors."

In considering a charge of unjustifiable extravagance the court should have regard to the position of the bankrupt and the amount of expectation which he might entertain from it, and unless extravagance in living is the immediate cause of insolvency, it is not unjustifiable (7).

Gambling and culpable neglect of business affairs.—Forward transactions where the intention is not to take or give delivery of goods but only to settle the differences may, if carried on a large scale, amount to gambling. Neglect of business should be such that it must have contributed to the insolvency. No man is entitled to do anything, much less the carrying on of business or trade, in a way as to injure the interests of others. By contracting debts and not attending to his business in a proper and reasonable manner, the insolvent jeopardises the interests of his creditors who lent him money.

Clause (g) : undue preference.—The expression 'undue preference' in this clause must be distinguished from fraudulent preference which constitutes an act of insolvency (8), and which can be avoided by the official assignee or receiver for the benefit of the general body of creditors (9). A preference may be 'undue preference' though not fraudulent. In *Re Skegg* (10), Lord Esher, Master of the Rolls, said, speaking of the section in the Act of 1883 :—

"I think, that the matters of preference dealt with in section 28, subsection (3) (f)" (corresponding to section 42 (1) (g) of this Act) "and in

(1) *Exp. Evans*, 31 L. J. Bank 63 ; *Exp. Downman*, 32 L. J. Bank 49.

(2) *Re Keays*, 1892, 9 Morr 18 ; in the matter of Hormosji Ardeshir Wadia, 1893, 17 Bom. 313.

(3) *Re Keays*, 1892, 9 Morr. 18.

(4) *Re Stainton*, 1887, 4 Morr. 242 : 19 Q. B. D. 182.

(5) *Re John Brown & Co.*, 1903, 22 T. L. R. 291.

(6) 4 Morr 242 : 19 Q. B. D. 182.

(7) *Exp. Ryley*, 14 L. T. 707.

(8) Section 6.

(9) Section 54.

(10) 64 L. T. 90.

2. section 48, sub-section (1)" (corresponding to section 54 of the present Act) "are not the same. The object of section 48 is to avoid certain transactions if they have been made with a particular intention ; while section 28 does not avoid any transactions, but has an entirely different object. The matters mentioned in section 28 are mentioned as matters which ought to be looked at in considering what the conduct of a bankrupt who is asking for his discharge has been. That is a different object, and therefore, the meaning of undue preference is different from the meaning of preference in section 48. This conduct of the debtor could not be made void. In my opinion, section 28, sub-section (3) (f) relates to something which the bankrupt may have done, being conduct which may affect his discharge. Now, what is the duty of a debtor who is unable to pay his debts as they become due, and is within three months of bankruptcy ? In my opinion it is his duty, when on the eve of bankruptcy, not to interfere in any way whatever among his creditors ; he knows that, on bankruptcy, whatever property he has will be equally divided among his creditors and he ought not to do anything to prevent that equal division ; if he interferes in any way in order to give any advantage to any one of the creditors over the others, he is guilty of giving an undue preference."

This principle was applied in the case of *Re Bryant* (1) to a payment in full of a creditor who would have probably been entitled to preferential payment under the bankruptcy, and such a payment would seem to be equally within the sub-section even if it was certain that the creditor will be entitled to payment in full under the bankruptcy.

Clause (k) ; previous insolvency.—Section 28 (3) (g) of the English Act of 1883 originally applied only to statutory compositions or arrangements. The present clause includes any composition. Apparently the practice of the court is not to grant a discharge in the second bankruptcy until the earlier bankruptcy has been closed (2).

Clause (l) ; concealment of property and fraudulent breach of trust.—A transfer of property by the insolvent prior to his insolvency with a view to use it as a shield against his creditors is a removal of property within the meaning of this clause (3). The breach of trust referred to in this clause must be fraudulent. A breach of trust which is committed not fraudulently is not within this clause (4).

Sub-section (2) ; receiver's report.—Under section 41 (2) the court is required, at the time of considering the application for discharge, to have the report of the receiver before it. Under the present sub-section the report of the receiver is to be deemed to be evidence and the court may presume the correctness of any statement contained therein. Where the report is in favour of the insolvent, the onus of proving the contrary lies on the opposing creditors (5). The court is not, however, concluded by the report even where the bankrupt has not given notice to dispute ; it is entitled to look into the evidence in which the findings of the report are based (6). The court has power to authorise the receiver to

(1) 1895, 1 Q. B. 420.

(2) *Re Binko*, 2 Morr. 45 ; *Re Davies*, 26 T. L. R. 458.

(3) *J. C. Moses v. Oakeshott*, 95 I. C. 522 : A. I. R. 1926 Cal. 794.

(4) *Re Freeman*, 1890, 7 Morr. 38 ; 62 L. T. 367 ; *Re Bottomley*, 1893, 10 Morr. 262.

(5) *Tara Singh v. Sarmukh Singh*, 146 I. C. 532 : A. I. R. 1933 Lah. 812.

(6) *Re Oswell*, 1892, 9 Morr. 202.

ascertain facts and report on the conduct of the insolvent (1). The report of the receiver is, however, evidence only for the purposes of S. 44, P. I. A., 1907 (S. 42, P. I. A., 1920). Statements recorded in an inquiry by a receiver cannot be treated as evidence by a court in proceedings before it under S. 36, P. I. A., 1907 (S. 53, P. I. A., 1920); such statements cannot also be treated as affidavits of the persons making them. The omission by a party to object to the admissibility of irrelevant evidence will not, in the absence of a deliberate consent or waiver of objection, cure the defect (2). Inquiry under S. 36, P. I. A., 1907 is a judicial inquiry and the court is not empowered to leave it to be done by the receiver (3). Whenever it is intended by the legislature that the report of the official receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter, for example, sections 38 and 42, and on which a finding can be based. The report of the receiver in any other matter, in the absence of an express provision that it may be treated as evidence, is not by itself legal evidence and any finding of the court solely based upon it is erroneous (4).

S. 43.

Sub-section (3).—Under section 41 (2) the court may refuse an absolute order of discharge, may grant it and suspend the operation of the order for a specified time or it may grant it subject to conditions. It is provided by the present sub-section that the powers conferred by section 41 (2) (b) and (c) may be exercised concurrently. We have already considered that this power is very useful in cases where grounds for refusing an order of absolute discharge exist.

43. (1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is so re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in

(1) *Monmohan Roy v. Hemanta Kumar Mookherjee*, A. I. R. 1916 Cal. 174; 23 G. L. J. 553.

(2) *Chinna v. Kumar*, 36 I. C. 906 : A. I. R. 1917 Mad. 838.

(3) *Simi Rowther v. Kumarappa Chetty*, 35 I. C. 875 : A. I. R. 1917 Mad. 858.

(4) *Basanti Bai v. Nanhemal*, 89 I. C. 357 : A. I. R. 1926 All. 29 : 47 All. 864.

3. force against him as if no order of adjudication had been made.

History.—From the history of section 27, traced before, it is clear that a debtor under the present Act must apply for his discharge within a period specified by the court in the order of adjudication. Section 43 makes that provision effective. The penalty for not applying for discharge or for not prosecuting an application for discharge, if one has been made, is that the adjudication shall be annulled. He may be re-committed to jail and all processes which were in force against the person of the debtor at the time of his release shall be deemed to be still in force against him as if no order of adjudication had been made. Under the old Act an order of adjudication operated as an automatic release of the debtor, if in jail. It was not obligatory for the debtor to apply for discharge, and the adjudication could not be annulled on that ground. In enacting Ss. 43 23 and 31 the main object of the legislature was to take away that right from the debtor and to place it in the hands of the insolvency court. The intention of the legislature finds very clear expression in sub-section (2) of the present section.

Analogous law.—See S. 41, P-t. I. A., which is in substance the same as the present section. The Bankruptcy Act, 1914, does not contain any similar provision.

Object of the section.—As already stated, the object of the section was to punish the debtor for not applying for discharge and to take away the protection which the order of adjudication gave him against his creditors in enforcing ordinary processes of execution. In actual practice the section did not turn out to work as it was originally intended. In insolvency proceedings many alienations by the debtor are void against the receiver, but which are, but for the insolvency of the debtor, perfectly valid under the ordinary law. One advantage which a creditor gets by sending his debtor to the insolvency court is that he is thereby enabled to set aside the fraudulent alienations of the debtor. Where it is more advantageous for the debtor to let his alienations stand as compared with the advantage of protection against arrest, it is natural that he will not apply for his discharge. In such cases it is the creditors who suffer and not the debtors. To obviate this hardship to the creditors the Indian courts have resorted to a number of alternative courses. We have seen under section 27 that the word 'shall' in section 43 is directory and not mandatory and that the period for the application of the discharge can be extended by the court at the instance of the creditor or even *suo moto*. Whenever it is not in the interests of the general body of creditors to terminate the insolvency, advantage has been taken of section 27, sub-section (2) for keeping the proceedings alive. It is doubtful whether the legislature had contemplated the extension of the period of discharge to meet these circumstances. The second course which has been generally adopted by the courts is to make an order under section 37. Both these alternative courses have given rise to a large number of decisions which we have noticed in their proper places.

When should the court not annul the adjudication ?—An order of adjudication should not be annulled where the condition that the debtor did not appear on the day fixed for hearing of his discharge is not satisfied. A person was adjudicated on a creditor's petition on 25th January, 1929 and was directed to apply for discharge within six months from that date. He applied on 4th July, 1929. Before his application the receiver had already applied under section 53 questioning the validity of

the deeds executed by the insolvent. During the pendency of the application the insolvent applied for his discharge and objections having been filed the following order was made :— S. 43.

“Let it be placed with the application for an order of discharge. Put up when any order is passed on the said application after the disposal of the receiver's application.” The court simultaneously dismissed the receiver's application and annulled the adjudication. The creditors appealed questioning the correctness of the order passed. It was held that as the court had not really fixed any date for the hearing of the insolvent's application for discharge and as that application was to be heard only after the disposal of the receiver's application under section 53, the lower court was wrong in annulling the order of adjudication (1). Nor mere failure to file *talbana* in an application for discharge for service of notice to creditors is a sufficient ground for annulling adjudication. An insolvent within the time fixed for his application for discharge applied for extension. At that time the court refused to grant extension and annulled the adjudication. In appeal it was held that the penalty of annulment under section 43 did not appear to be intended for insolvents coming before the court in time and submitting themselves to the discipline of the court. If the court was not prepared to extend the time it might properly have treated that application as one for discharge or should have allowed the insolvent to make immediately an application for discharge (2). Where the court does not specify the time within which the insolvent is to make an application for discharge in terms of clause 1 of section 27, the penalty prescribed by section 43 of annulling adjudication does not come into operation (3).

Whenever it is not in the interests of the general body of creditors to terminate the proceedings, the court should not annul the adjudication but extend the time for applying for discharge. Thus where petitions under Ss. 53 and 54, P. I. A., are still pending or where allegations of fraudulent conduct against the debtor have to be inquired into, the court should not annul the adjudication (4). In cases of old insolvencies the court should be very slow in making orders of annulment. An order of annulment is intended to be a penalty imposed upon a debtor who fails to obtain his discharge, the theory being that it will deprive him of the benefit of the insolvency and render him liable to be attacked by his creditors ; but where the insolvency has endured for 15 years, an order annulling the insolvency confers a privilege upon the debtor, and does not impose any penalty upon him. The creditors are not likely to attack him, even if their debts are not barred and he is relieved from the stigma of insolvency, though he may have paid only a very small dividend to the creditors and unless an order is made under section 23 he may get property returned to him. While commenting on the proposition whether the provisions of section 43 are mandatory or not, Page, C. J., made the following important observations on the use of the present section :—

(1) *Sultan-ud-Din v. Hakim Amin-ud-Din*, A. I. R. 1930 Oudh. 474 : 128 I. C. 273.

(2) *Vellachami Chetti v. Arunachalam Chetti*, A. I. R. 1931 Mad. 325. 131 I. C. 150.

(3) *Gopal Ram v. Magni Ram*, 7 Pat. 375, F. B. : A. I. R. 1928 Pat. 338 : 107 I. C. 830 ; *Sidick Haji Hussain v. Official Assignee of Bom.* 59 Bom. 600 : 157 I. C. 930 : A. I. R. 1935 Bom. 310.

(4) *Selvam Chettiar v. Venkatachalam Chettiar*, A. I. R. 1931 Mad. 10 : 129 I. C. 36.

43. "I feel bound to say, however, that I have endeavoured to discover some sound reasons for holding that the provisions of section 43 are mandatory, but I can find none. It is highly inexpedient on general grounds, unless there are good reasons for so doing, that the legislature should limit or fetter the discretion of the court. I am at a loss to conceive of any useful purpose that could be served by holding that the provisions of section 43 are mandatory. Why should the court be deprived of the power of determining in the circumstances of each case whether it is in the interest of the general body of creditors or otherwise expedient that the insolvency should be annulled under section 43? If the court is entitled to pass or refrain from passing an order of annulment under section 43, the result will be that an order of annulment will be made in a proper case and not otherwise, and an insolvent by refraining from applying for his discharge within the period fixed in that behalf will not thereby be enabled to defraud the general body of creditors of the rights and remedies which would accrue to them if the debtor's estate is administered in insolvency. If an attempt were to be made to cheat the general body of creditors in this way the court, in my opinion, ought to have jurisdiction to refuse to annul the adjudication *simpliciter* or until after the determination under section 53 or section 54 as that with which we are concerned in the present case" (1).

Are the provisions of section 43 mandatory?—See commentary under section 27.

Can the court extend time for making an application for discharge?—See commentary under section 27.

No automatic annulment on the expiry of the period fixed; specific order of the court necessary.—In all those cases (which have been fully dealt with under section 27) where it has been held that a court has power to extend the period fixed for discharge even after the expiry of the period originally fixed, it has also been held, as a necessary part of the reasoning on which that opinion is based, that a specific order of the court annulling adjudication is necessary under section 43; and the mere fact that the period fixed has expired does not operate as an annulment of the order of adjudication by itself. Some of these cases are also mentioned below (2). In an Allahabad case an application was made for the arrest of an insolvent in execution of a decree against him. The insolvent had not obtained any protection order nor had he applied for his discharge within the time specified by the court. It was contended for the insolvent that as he had not applied for discharge within the specified time, the adjudication stood annulled automatically and that he was automatically discharged. This contention did not prevail and it was held that he was

(1) Jaing Bir Singh v. R. K. Bannerjee, A. I. R. 1933 Rang. 223 F. B. : 145 I. C. 320 : 11 Rang. 287

(2) Palani Goundan v. Official Receiver of Coimbatore, 124 I. C. 61 : 53 Mad. 288 : A. I. R. 1930 Mad. 389 ; A. J. R. Abraham v. H. B. Sookias, 81 I. C. 584 : 51 Cal. 357 : A. I. R. 1924 Cal. 777 ; Hari Ram v. Srikrishna Ram, 100 I. C. 320 : 49 All. 201 : A. I. R. 1927 All. 418 ; Wally Mohamed Cassim v. Haji Ayoob Haji Abba & Co., 144 I. C. 869 : A. I. R. 1933 Rang. 133 ; Ishardas v. Mst. Fatima Bibi, A. I. R. 1934 Lah. 468 : 153 I. C. 993 : 15 Lah. 698 ; Asa Nand v. Jugal Kishore, A. I. R. 1935 Lah. 606 : 159 I. C. 667 ; Madho Prasad Vyas v. Madho Prasad, A. I. R. 1933 All. 230 : 55 All. 241 : 145 I. C. 668 ; Asa Nand v. Jugal Kishore, A. I. R. 1933 Lah. 1008 : 147 I. C. 778.

liable to arrest (1). Not only that the adjudication does not stand automatically annulled after the expiry of time fixed for discharge in case no application is made, but also the court cannot make a conditional order to take effect in future that if within a particular time no application is made, the order of adjudication shall stand annulled (2).

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Who can apply for annulment.—Any person who is interested and whose rights are affected by the proceedings in insolvency can apply under this section. All those persons who can apply for extension of the period of discharge can also apply under this section. An unsecured creditor is a person who can apply (3). In the corresponding S. 41, Pt. I. A., 1909, it is expressly provided that an adjudication may be annulled on the application of the official assignee or of a creditor or of its own motion by the court. The same holds good under section 43 of the present Act (4).

Notice of application for annulment.—Whenever there is an application for annulment or the court proposes to proceed of its own motion, notice should be given to the creditors (5). In *Gopal Ram v. Magni Ram* (6) the court had directed notice to issue upon the insolvent to show cause why the adjudication should not be annulled. In the High Court objection was taken to this procedure. Jwala Prasad, J., remarked:—

“There is no provision for issuing fresh notice upon the insolvent calling upon him to show cause why the adjudication should not be annulled, and hence here again the order of the court of 3rd November, 1930 has no sanction in the Act.” The language of Adami, J., was stronger. He said, “When on 3rd November, 1935 the court found that no application for discharge had been made, according to the plain provisions of the law the court was bound to annul the adjudication. The steps taken by the court in calling upon the judgment-debtor to show cause were altogether unwarranted by the Act.” Mr. Mulla is of opinion that notice should also be given to the insolvent, in any event in cases arising in those provinces where the view prevails that the court is not bound, on the insolvent's failure to apply for his discharge within the specified time, to annul the adjudication, so that if the failure is satisfactorily explained, adjudication may not be annulled (7). Such notice is usual under the Presidency-Towns Insolvency Act (8).

And the provisions of section 37 shall apply accordingly.—Section 37 occurs under the heading “annulment of adjudication.” Sections 35 and 36, which also occur under the same heading, provide for cases of annulment. Section 39 deals with the annulment of the order of adjudication on approval by the court of a proposal or composition scheme

(1) *Maharaj Hari Ram v. Sri Krishan Ram*, (1927) 49 All. 201 : 100 I. C. 320 : A. I. R. 1927 All. 418. (Was the case worth reporting?)

(2) *Sidick Haji Hussain v. Official Assignee of Bombay*, 59 Bom. 600 : 157 I. C. 930 : A. I. R. 1935 Bom. 310.

(3) *Arunagiri Mudaliar v. Kandaswami Mudaliar*, 83 I. C. 955 : A. I. R. 1924 Mad. 635.

(4) Mulla, page 235.

(5) *Jethaji Peraji Firm v. Krishnayya*, (1929) 52 Mad. 648, 652 ; K. K. S. A. R. A. Chettiar v. Maung Myat Tha, (1927) 100 I. C. 921 : A. I. R. 1927 Rang. 136 ; *Bohray Shankerlal v. Bansidhar*, A. I. R. 1937 All. 686.

(6) A. I. R. 1928 Pat 338 : 7 Pat 375 : 107 I. C. 830.

(7) Mulla, page 235.

(8) See Cal. Rules 142 (b), 142 (c) ; Bom. Rules 137, 138 and Rang. Rule 177.

and it has been provided that the provisions of section 37 shall apply to such annulment. Section 40 provides for re-adjudging the debtor insolvent where the composition scheme is not carried out. It would thus appear that section 37 applies to all the cases of annulment of order of adjudication provided in the Act. Ordinarily an order of annulment terminates the insolvency proceedings but they can be kept alive by orders passed under section 37 (1). The order under section 37 should be made at the time when the adjudication is annulled. It has, however, been held that such an order can be made even afterwards under the inherent powers of the court (2). Section 43 is apparently intended for the protection of creditors. There is, however, a difference of opinion as to the extent it can be so used. One view is that on annulment proceedings in insolvency are not terminated and it is open to the court to attach conditions to it. The annulment of adjudication under section 43 is merely a continuation of the insolvency in another form and it is open to the court to pass either a conditional or unconditional order of annulment and that the court is competent to order under section 37 that the property shall vest in the official assignee or any other person for the benefit of the creditors (3). Thus an order under section 37 can enable the insolvency court by annulling insolvency court to proceed and eventually decide petitions under sections 53 and 54 for avoidance of alienations by the debtor (4). The property which so vests in a person can be sold by that person and the proceeds distributed amongst the creditors (5). The other view is represented by an Allahabad case (6). There it was held, "Section 37 does not allow an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency and by annulling the insolvency, the court comes to the conclusion that it will not proceed with the insolvency. Having come to that conclusion, the course open to the court is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law, or pending such security or for some other reason the court may direct the property of the insolvency in the hands of the receiver to vest in a certain person. But the words "to vest in such person" do not mean distributing the property among the creditors. Such vesting is only for the purpose apparently of making the property available to creditors to proceed through the civil court."

(1) *Bhadramma v. Parvatasam Ayyavaru*, 139 I. C. 574 (2) : A. I. R. 1932 Mad. 731.

(2) *Chouthmal Bhagirath v. Jokhiram Surajmal*, 12 Pat. 163 : 141 I. C. 836 : A. I. R. 1933 Pat. 84 ; *Balla Mal v. Mst. Fatima Bibi*, 15 Lah. 698 : A. I. R. 1934 Lah. 468 : 153 I. C. 993. (These cases are fully noticed under section 37.) ; *Keshablal Dhar, In re*, 60 Cal. 259 : A. I. R. 1933 Cal. 386 : 144 I. C. 214.

(3) *M. R. M. C. L. Somasundaram Chettiar v. P. R. S. A. R. Peria Karuppan Chettiar*, A. I. R. 1930 Mad. 520 : 126 I. C. 621.

(4) A. I. R. 1930 Mad. 520 *supra* ; *T. Bhadramma v. T. Parva Teesam*, A. I. R. 1932 Mad. 731 : 139 I. C. 574.

(5) *Roop Narain v. King*, A. I. R. 1926 Lah. 370 : 94 I. C. 234 ; *Bagie Ram v. Channamal*, A. I. R. 1928 Lah. 453 : 108 I. C. 603 ; *Motharam v. Pahlajrai Gopaladas*, A. I. R. 1925 Sind 159 : 80 I. C. 141 ; *In re M. F. Nazaret*, A. I. R. 1931 Sind 31 : 129 I. C. 898.

(6) *Panna Lall v. Official Receiver*, A. I. R. 1931 All. 71 : 53 All. 313 : 134 I. C. 148.

To the above statement may be added the following extract from a Full Bench judgment of the Rangoon High Court (1) :— **S. 43.**

"That some limit must be placed upon the power of the court to impose conditions under section 37 is, I think, manifest. For instance, I think that the court after passing an order annulling the insolvency would not be entitled to order that the property should be vested in an appointee who should continue the liquidation of the debtor's assets on the same terms and conditions as those on which the receiver in insolvency would have been entitled to carry out the liquidation if the insolvency had still been subsisting. Nor I, think, would it be competent for the court, after an order of annulment had been passed, to direct that the liquidation of the debtor's assets should be carried out on the terms of the same scheme which the court might think just and proper. The effect of so holding would be that it would be permissible for the court to direct that the liquidation of a debtor's estate should be carried out in some manner other than that prescribed under the insolvency Act, and the discretion of the court would be substituted for the provisions of the insolvency Act. That could never have been intended."

The Rangoon Full Bench case was applied in a subsequent ruling (2) of the same High Court, where it was held that the appointee under section 37 is no more than the custodian of such property, and the creditors are not entitled to any relief against him. All that they are entitled to do as regards him is to execute any decree that they may obtain against the insolvent by getting a garnishee order on account of his custody of the property belonging to the insolvent. It was further held that a payment by such appointee to a creditor of the insolvent does not save limitation under section 19 or 20 of the Limitation Act.

I have gone into the above proposition of law at some length because under section 43 very often the question arises whether after annulment of adjudication a court is competent to proceed with and decide petitions for avoiding alienations. Relying on the first view of the powers of the court under section 37, it has been held that the court may annul the adjudication under section 43, at the same time making an order vesting the subject-matter of the alienation in some person under section 37 and that, by virtue of that order, it can go on with such petitions. Relying on the second view it has been held that this cannot be done. Apart from this conflict, the view that the court cannot proceed with the receiver's application under section 53 or section 54 has been supported by the argument that the court's power in passing a vesting order section 37 relates to the property of the debtor and not to the property of any other person, and that, whether the court vests the property in the debtor or in some other person unconditionally or imposes conditions when making the order, the court, after the insolvency has been annulled under section 43, has no jurisdiction thereafter to pass any order affecting the property of any person other than the debtor. There is abundant authority for the proposition that when such annulment is made the debtor reverts to the position that he was in before the insolvency. In such circumstances,

(1) Jaingbir Singh v. R. K. Bannerjee, A. I. R. 1933 Rang. 223 (F. B.) : 11 Rang. 287 : 145 I. C. 320.

(2) Maung Po Gyi v. R. K. Banerjee, A. I. R. 1935 Rang. 152 ; 156 I. C. 783.

14. after the order of annulment is made, could the debtor file an application or continue a subsisting application under section 53 or 54 to annul a transfer by himself to a transferee? Obviously not. Even during the insolvency the debtor would not have been entitled to present such an application, for as between him and the transferee from him the transfer would be valid in law. It is only because, under the special provisions of the Insolvency Act, jurisdiction is given to the court to declare a transfer void against the receiver as representing the general body of creditors that the court has any jurisdiction to set aside a transfer which, as between the debtor, the transferor and the transferee, is valid in law and not open to challenge (1). The view that unless the alienation is set aside the property belongs to the alienee and not to the debtor and that section 37 would not justify an order vesting such property in any other person was also adopted by Ramesm, J., in A. I. R. 1931 Mad. 10 (2).

Review of the order of annulment.—It has been held that according to the provisions of Order 47, C. P. C., which applies to insolvency proceedings by virtue of section 5, the court can review its own orders. For full notes see section 5.

Remedy of debtor whose adjudication is annulled under this section.—One remedy is that he can apply to the insolvency court for review (3), the other remedy is that he can make a new application under section 10 sub-section (2), with the leave of the court by which the order of adjudication was annulled (4). The third remedy would, most probably, be to make an application under O. 9, R. 13, C. P. C., if the conditions of that rule are satisfied. In this connection it may be noted that an order of annulment can be set aside under Order 9, C. P. C., only on the assumption that the debtor was entitled to a notice at the time of annulling his adjudication under section 43. It has been held in a Madras case that this remedy is not open to the debtor on the ground that there is a specific provision, section 10 (2), on the subject and order 9, C. P. C., does not apply under section 5 of the Act (5).

Appeal.—There is no appeal against an order under section 43, except, with the leave of the court, under section 75 (3) of the Act. But a petition for revision lies to the High Court by a person aggrieved. Creditors who have tendered their proof are persons aggrieved for the purposes of revision and appeal (6).

44. (1) An order of discharge shall not release the insolvent from—

Effect of order of discharge,

(a) any debt due to the Crown ;

(1) A. I. R. 1933 Rang. 223 (F. B.).

(2) *Selvam Chettiar v. Y. P. N. Venkatachalam Chettiar*, A. I. R. 1931 Mad. 10 : 129 I. C. 36.

(3) *Abpireddi v. Venkatarreddi*, 94 I. C. 351 : A. I. R. 1927 Mad. 175.

(4) *Ram Dass v. Sultan Hussain Khan*, 115 I. C. 107 : A. I. R. 1929 Oudh 149.

(5) *Venugopalachariar v. Chunnilal*, (1926) 49 Mad. 935 : 97 I. C. 706 : A. I. R. 1926 Mad. 942.

(6) *Abpireddi v. Venkatarreddi*, 94 I. C. 351 : A. I. R. 1921 Mad. 175.

- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party ; S. 44.
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party ; or
- (d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from debts provable under this Act.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or have made any joint contract with him or any person who was surety for him.

History.—The corresponding section, namely, section 45 of the Act III of 1907, ran as follows :—

“(1) An order of discharge shall not release the insolvent from :—

“(a) any debt due to the Crown ;

“(b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party ; or

“(c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party.

“(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts entered in the schedule.”

“(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him ”

It will be seen that clause (d) of the present sub-section (1) is new. Under Section 34, we have considered when a liability for maintenance is a provable debt. Now by clause (d) a liability under an order of maintenance made under S. 488, Cr. P. C., remains unaffected by an order of discharge, apart from all questions of its being a provable debt or not. The second point of difference between the old section and the new one is that the scope of an order of discharge is now enlarged and it has the effect of releasing the insolvent from all provable debts, whereas under the old section it released the insolvent from those debts only which were entered in the schedule (1). Under S 352, C. P. C., 1882, the relief was limited to scheduled debts only. A creditor could not be compelled to get his debts entered in the schedule and claim a dividend in insolvency. If any creditor

- 4 did not choose to come and participate in insolvency proceedings, he could, after the termination of the insolvency proceedings, proceed against the insolvent's person and property. Thus under the old law the insolvent had a limited relief, and because of this defect it did not carry out the policy of the insolvency laws.

Analogous law.—S. (1) 45, sub-sections (1), (2) and 4, Pt. I.A., 1909, is the same as S. 44, sub-sections 1, 2 and 3, P. I. A., 1920. By S. 45, sub-section. (3), Pt. I.A. 1909, it is provided that an order of discharge should be conclusive evidence of the insolvency and of the validity of the proceedings therein. And this sub-section corresponds to sub-section (3) of S. 28, B. A., 1914. There is no such provision in the Provincial Insolvency Act but it is submitted that the same rule will hold good. In this connection reference may also be made to S. 41, Indian Evidence Act. The corresponding provisions of the English Acts are S. 30, B.A., 1883, and S. 28, B. A., 1914. The list of excepted debts under the English Acts is larger than that in the Indian Acts.

Crown debts.—In determining whether or not a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State (1). A judgment-debt due to the Secretary of State for India in Council arising out of a transaction at a public sale of opium held by the Secretary of State for India in Council is a debt in respect of Crown property, and therefore a "debt due to our Sovereign Lady the Queen" within the meaning of section 62 of the Insolvency Act. Where the plaintiff instituted a suit in *forma pauperis* against the defendant and obtained a decree; and the decree directed that the property in suit should be conveyed to the plaintiff and the taxing officer was to certify the amount of court fee that would have been payable by the plaintiff, had she not sued in *forma pauperis* and then to tax the plaintiffs' other costs of the suit, it was held that the court-fee formed a Crown debt and under ordinary circumstances the principle would apply that the Crown would be entitled to precedence in payment of this debt over all creditors (2). To conduct a soap factory is not outside the powers of Government. Debt due by an insolvent to a soap factory conducted by Government is a debt due to the Crown and is a first charge on his estate (3). A debt in the name of the Crown for the benefit of the subject is a Crown debt (4).

It is to be noted that though an order of discharge does not release the insolvent from Crown debts, the Crown, if so advised, can come in and prove in insolvency. If it does so, its debts shall have priority over all other debts due from the insolvent in the distribution of his property. See section 61 (1).

Sub-section (1) (b); debts incurred by fraud etc.—By this clause debts or liabilities incurred by means of any fraud or fraudulent breach of trust to which the insolvent was a party are excepted from the effect of the order of discharge. Such debts are, however, provable debts under section 34, unless the demand arises otherwise than by reason of a

(1) Secretary of State for India v. Bombay Land and Shipping Co., (1868), 5 Bom. H. C. C. 23, cited in 12 Cal. 445; Judah v. Secretary of State for India, (1886) 12 Cal. 445.

(2) Gaya Noda Bala v. Butto Kristo, 1906, 33 Cal. 1040.

(3) In the matter of Subramania Chetty, A. L. R. 1922 Mad. 243 : (1922) 45 Mad. 153 : 70 I. C. 764.

(4) *Re Smith*, L. R. 2 Ex. D. 47.

S. 4
(1).

contract or a breach of trust. Under section 34 debts arising out of contract or a breach of trust, whether there has been fraud or not and whether the insolvent was a party to that fraud or not, are provable. Such debts have always been held provable. Even then the liability of the trustee for debts due from him was not absolutely released by an order of discharge under the English law. It was argued that although the certificate or order barred the right to the original debt due from the trustee, yet as the duties, characters, and functions of the debtor are perfectly distinct from those which belong to him as a trustee, and inasmuch as it is the duty of the defaulting trustee to prove under his own bankruptcy just as much as if he was a stranger to it, he would commit a breach of trust by not proving, and he was held liable in spite of the order of discharge to the amount of dividends which he would have received under the bankruptcy (1).

Under section 49 of the Act of 1869 it was held that a debt entered by fraud or breach of trust was not released by discharge, even though it was provable and proved in bankruptcy; and after the discharge the debtor was held liable to pay the whole amount of the debt, or so much thereof as had not been received under the bankruptcy (2). The costs of an action brought against the debtor on the footing of a fraudulent breach of trust do not constitute a debt or liability incurred by fraud or fraudulent breach of trust (3). The liability of a promoter of a company who has received secret profits from the vendors to make it good to the company is incurred by fraud and also by breach of trust, and he is not released from such liability by his discharge (4). A debt incurred by borrowing money on a promote without disclosing to the creditor that the debtor had previously filed an insolvency petition is a debt contracted fraudulently and an order of discharge does not release the insolvent from liability to pay the debt (5).

The words "fraudulent" and "to which he was a party" were inserted in the Bankruptcy Act, 1883, section 30, for the first time. As noted before, under the Act of 1869 an order of discharge did not release the bankrupt from a debt incurred by means of fraud or breach of trust. By expressly excluding from the operation of the order of discharge debts and liabilities incurred by a fraudulent breach of trust, the legislature has impliedly held that an order of discharge should release the insolvent from debts incurred by a non-fraudulent breach of trust. Before the words "to which he was a party" were added, it was held in *Cooper v. Pritchard* (6), that a partner in a solicitor's firm, though he was not a party to a fraudulent breach of trust committed by his co-partner, was not released by his discharge from his liability to the client. The present amendment overrules that decision.

Liability for maintenance.—Under S. 488, Cr. P. C., a competent Magistrate can entertain an application against any person and order such person to make a monthly allowance for the maintenance of his wife or children, on certain conditions being satisfied, and on certain other facts

(1) *Orrett v. Corser*, 1855, 21 Beav. 52; See also *Exp. Holt* 2 M. & A. 562.

(2) *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122 and see *Hale v. Boustead*, 1881, 8 Q. B. D. 453; *Jack v. Kipping*, 9 Q. B. D. 113.

(3) *Re Greer*, (1895) 2 Ch. 217.

(4) *Emma Silver Mining Company v. Grant*, (1881) 17 Ch. D. 122.

(5) *Sir Nivarilu Naidu v. Sunderesa Iyar*, A. I. R. 1937 Mad. 677.

(6) (1883) 11 Q. B. D. 351.

- 44 1). being proved. For every breach of such an order the Magistrate can realise the amount to be paid under the order as if it were a fine and can also award a sentence of imprisonment for such non payment. Clause (d) excepts orders for maintenance under section 488 only. Under section 34, we have seen that the law as to whether amounts due on account of maintenance are provable in insolvency or not is not quite free from difficulty. The English law on the subject is highly technical and the English rulings on the point have not always been followed in India, having regard to the different conditions prevailing here. Whether a liability for maintenance is provable or not, the order of discharge does not effect such a liability where it arises out of an order passed by a magistrate under section 488. Orders therefore for the payment of arrears of maintenance may be made and enforced, in spite of the discharge, whether the arrears became due before or after the discharge. Opinion has been expressed that if a person against whom such an order is made becomes insolvent and obtains a protection order, he will not be protected from arrest or imprisonment, for a protection order extends only to debts provable in insolvency. This opinion proceeds upon the assumption that a liability for maintenance under section 488 is not provable in insolvency—an assumption which should be accepted only with hesitation. If such a liability is not provable in insolvency, it will not be affected by an order of discharge under (2) itself and an express provision making an exception to the general rule is redundant. Under section 488 it is open to the person who has been ordered to pay maintenance to show that he is unable to pay the amount and he may rely on the order of adjudication to prove his inability. In a Calcutta case where such a person was adjudged insolvent on his own petition, it was held that the order of adjudication was conclusive proof of his inability to pay, and that he could not, therefore, be sentenced to imprisonment (1).

The right to sue in respect of excepted debts.—Under section 28 no suit or other legal proceedings can be commenced in respect of any debt provable under this Act during the pendency of the insolvency proceedings after the making of an order of adjudication against a person. The bar operates in respect of provable debts only. The debts excepted from the effect of an order of discharge are in many cases provable in insolvency. Crown debts, debts or liabilities arising out of contracts and breaches of trust (except those which are founded in tort) and liabilities for maintenance in certain cases (for that see commentary under section 34) are provable in insolvency. In respect of such debts which are unaffected by an order of discharge but are at the same time provable in insolvency, the right of a creditor to sue seems to arise at the time from which dates the debtor's right to after-acquired property, *i.e.*, in the case of a bankruptcy the time of discharge (2). Until discharge execution in such an action would be restrained under S. 7, B A., 1914 (3), but the action itself will not be restrained and the creditor can proceed upto judgment in any action to which the discharge would be no defence (4). In the case of a composition it seems that the right to sue does not arise until payment of the composition (5).

(1) *Halfhide v. Halfhide*, 50 Cal. 867 : 81 I. C. 912 : A. I. R. 1924 Cal. 230.

(2) *Exp. Hemming*, (1879) 13 Ch. D. 163.

(3) *Cobham v. Dalton*, L. R. Ch. 655.

(4) *Exp. Coker*, L. R. 10 Ch. 652.

(5) Observations of Lord Selborne, L. C. in *Exp. Barrow*, 18 Ch. D. 464.

Sub-section (2) ; release from all provable debts.—Subject to the exceptions mentioned in the preceding sub section, an order of discharge, whether absolute or subject to conditions, releases the debtor from all debts provable in insolvency. The rule is based on policy of law and not on any rule of constructive notice to the creditors. Notice or no notice, section 44 comes into play and releases the insolvent from the debts, even if the omission of the name of a creditor be deliberate on the part of the insolvent provided no question of fraud is involved (1). The fact that the creditor was not informed of the insolvency proceedings does not prove that the debt was incurred by fraud within the meaning of section 44 (1) clause (b) (2). The same rule applies to a judgment-creditor who too will be precluded from executing his decree (3). The right of proof, however, is not determined by an order of discharge. The reason is that an order of discharge does not always terminate insolvency proceedings. A creditor, though he has not proved before discharge, is entitled to come in and prove at any time so long as there are assets available for distribution provided that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the court may think it just to impose (4). Also see commentary under section 33.

**S. 44
(2).**

Effect of discharge on the debt ; promise to pay a debt barred by discharge.—In an English case it has been held that though an order of discharge releases the bankrupt from certain debts provable in the bankruptcy, its effect is not to destroy the debt as though it had never been, so that where a bankrupt was entitled to a benefit under a will which provided that in ascertaining the amount of the benefit a claim against him by the testator was to be brought into account ; and the testator proved and received a dividend in the bankruptcy and the bankrupt obtained his discharge before the death of the testator, it was held that the directions of the testator must be obeyed and the bankrupt was only entitled to the benefit under the will after bringing into account the full amount of the original liability to the testator (5). It is also settled law that a debt which is barred by a discharge cannot be revived by a subsequent promise to pay. Prior to the Bankruptcy Act of 1869, it was held that an action was maintainable on a promise supported by a debt barred by an order of discharge (6). It is to be remarked that the word used in this section is "release" and if the word "release" be used in its technical sense, its effect would, of course, be not merely to bar the remedy but to extinguish the debt (7). It has been said that when a debtor is discharged from a debt by bankruptcy, a promise by him to pay it is a mere *nudum pactum*, and therefore according to a well known principle of law would not sustain an action (8). The leading case, where this opinion was, however, finally adopted, is the

(1) *Kundan Lal v. Nathu*, 55 All. 636 : 146 I. C. 765 : A. I. R. 1933 All. 600; *Elmslie v. Corrie*, (1877) 4 Q. B. D. 295.

(2) *Prithi Raj v. Vishnu Das*, 144 I. C. 888 : A. I. R. 1933 All. 340.

(3) *Ram Rao v. Vasu Deo*, A. I. R. 1928 Nagpur 336 : 110 I. C. 893.

(4) *Re McMurdo*, (1902) 2 Ch. 684, 699 ; *Siva Subramania v. Theethiappa*, (1926) 47 Mad. 120 : 75 I. C. 572 : A. I. R. 1924 Mad. 163 ; *Re Ram Chandar Ganuji Waikar*, 1927, 29 B. L. T. 1167.

(5) *Re Ainsworth*, 1922, 1 Ch. 22, followed by the Madras High Court in *Haji Abdul Kuthus v. Inayathulla*, A. I. R. 1937 Mad. 727.

(6) *Penn v. Bennett*, 1815, 4 Camp. 205 ; *Kirkpatrick v. Tattersall*, 13 M. & W. 766.

(7) *Thomson v. Cohen*, L. R. 7 Q. B. 527, 532, *per* Blackburn, J.

(8) *Jones v. Phelps*, 20 W. R. 92, *dicta* of Bacon, C. J.

- 4 English case of *Heather v. Webb* (1). Where A became insolvent and was discharged, and A had executed a pronote X in favour of B before his insolvency and had executed another pronote Y in favour of B again, after A's discharge, the consideration for the later pronote being the pronote X., it was held that B could not enforce the pronote Y against A because the pronote X was automatically discharged on A's discharge under section 44 (2) and hence there was no consideration for Y (2). But where after discharges a promise to pay the debt is supported by a new and valuable consideration, an action will lie against the debtor for the amount of the debt (3).

In *Jakeman v. Cook* it was held that an agreement entered into after discharge to pay one of the creditors in full in consideration of the creditor agreeing to supply further goods was a valid agreement and would support an action. Where an Italian subject became bankrupt in 1897 and obtained his discharge in 1901 without having disclosed his indebtedness to a creditor, also an Italian subject, who was unaware of the bankruptcy proceedings, and in 1905 the debtor executed a document in Italy called a *privata scrittura*, which was to be deemed a public instrument whereby the debtor acknowledged his debt and undertook to pay it within 5 years, and in March, 1908, the debtor died, and in an action to administer his estate in this country the creditor proved for the debt, and it was proved that according to the Italian Law no consideration was necessary to support a promise to pay the old debt, there being a moral obligation to pay, which by the execution of the *privata scrittura* was converted into a legal obligation enforceable in Italy, the Court of Appeal held that the *privata scrittura* constituted a new and enforceable contract entered into after the discharge, and that the claim was not therefore barred by section 33 of the Act of 1883, now sub-section (3) of section 28, B. A., 1914 (4). A contract by an undischarged bankrupt for payment of a debt provable in the bankruptcy, the consideration being a new loan made at the time of the promise, was held to be enforceable and not contrary either to the policy of the Bankruptcy Act or to public policy (5).

An order of discharge does not affect secured creditors.—An order of discharge does not affect the rights of a secured creditor against the insolvent (6). • An attaching creditor is not a secured creditor and if he does not prove his debt under section 34 an order of discharge releases the insolvent from such a debt (7).

Effect of an order of discharge outside India and vice versa.—An order of discharge passed by a British Indian court shall be recognised and given effect to by every other court of British India. It is immaterial that the creditor is a foreigner and was not given notice of the insolvency proceedings. The principles on which an order of discharge passed by British Indian courts will be recognised in any country forming part of the British Dominions depend upon the authority of the Legislature which passed the statute under which the order of discharge is granted. Thus it has been held in England that the discharge from any debt under a

(1) C. P. D. 1.

(2) *Kathayan Chettiar v. Govindaswami Chettiar*, A. I. R. 1932 Mad. 416 : 137 I. C. 320.

(3) *Jakeman v. Cook*, 4 Ex. D. 23 ; *Re Aylmer*, 1 Mans 391.

(4) *Re Bonacina*, 1912, 2 Ch. 394.

(5) *Wild v. Tucker*, (1914) 3 K. B. 36.

(6) *Sri Dhar Narain v. Atma Ram*, 7 Bom. 455.

(7) *Ram Rao v. Wasu Dev*, 110 I. C. 893 : A. I. R. 1928 Nag. 336.

bankruptcy Act of the Imperial Parliament is a complete bar, in any country forming part of the British Dominions, to a debt contracted in any part of the world (1). It forms a good answer to an action brought in courts subject to English jurisdiction (2). The Indian Insolvency Act, 1848, was an Act of the Imperial Parliament and a discharge from any debt under that Act was a discharge from such debt in any country forming part of the British Dominions (3). The Presidency-towns and the Provincial Insolvency Acts are Acts of the Indian Legislature, and a discharge under those Acts can have no such operation. Orders of discharge passed under these Acts will now be recognised by the Courts of the British Empire and other foreign countries on the general principles of Private International Law. The rule of Private International Law is that a foreign certificate is a bar to a debt contracted in the country of the certificate, if the debt would thereby be barred there (4); but is not a bar to an action for a debt contracted or on a contract made and to be performed in England, even though the party sought to be charged is domiciled in the foreign country (5). It has been held by the Madras High Court that the discharge from a debt under the bankruptcy law of Ceylon where the debt was contracted is a discharge from that debt in a British Indian court (6). A discharge under an Act of Colonial Legislature has been held not to be a bar for the recovery of debt contracted and to be performed in England (7). In a Bombay case the debtor was adjudged insolvent in Bombay and he obtained his discharge from the Bombay Court. After his discharge, on one of the creditors, who had obtained a decree against the insolvent in the court of Sirohi State, threatening to execute the decree by attaching the insolvent's property in that State, the insolvent applied to the Bombay court for an injunction restraining the decree-holder from executing the decree. The State had refused to recognise the official assignee. It was held that a court had jurisdiction to restrain a party within the jurisdiction from prosecuting a suit in a foreign court if it thinks that the action of the parties in filing the suit in the foreign court is opposed to notions of equity etc., of the court seeking to restrain him, and that it will not suffer anyone within its reach to do what is contrary to its notions of equity merely because the act to be done be, in point of locality, beyond its jurisdiction (8).

S. 44
(2).

Other effects of an order of discharge.—An order under section 53 of the Act of 1883, now Section 51, B. A., 1914, for appropriation of pay or salary was held to have been put an end to by an order of discharge

(1) *Ellis v. McHenry*, (1871) L. R. 6 C. P. 228; *Armani v. Castrique*, (1845) 13 M. and W. 443, 447: 153 E. R. 185, 186.

(2) *Armani v. Castrique* *supra*.

(3) In order that an order of discharge under the Indian Insolvency Act, 1848, could have operation outside British India it was necessary that notice of the order nisi should have been published in the London Gazette. I. I. A., 1848, Sec. 60.

(4) *Potter v. Brown*, (1804) 5 East 124: 102 E. R. 1016.

(5) *Gibbs v. Societe Industrielle*, (1890) 25 Q. B. D. 359; *Bartley v. Hodges*, (1861) 30 L. J. Q. B. 352.

(6) *Maguda v. Muhammadu*, 51 I. C. 38.

(7) See *Bartley v. Hodges*, 30 L. J. Q. B. 352; *Smith v. Buchanan*, 1 East, 6; *Phillips v. Alan*, 8 B. & C. 477, 481.

(8) *Lakhmi Ram v. Pooranchand*, 45 Bom. 550: 59 I. C. 444: A. I. R. 1921 Bom. 128 (2), the injunction was refused on facts; *Venechand v. Lakhmi Chand*, 44 Bom. 272: 53 I. C. 395: A. I. R. 1920 Bom. 309 (it was so assumed); See also *Carron Iron Company v. Maclarin*, 1885, 5 H. L. C. 416.

14 unless expressly continued (1). In cases where there is a money penalty for some offence of a criminal nature other than the mere non-payment of money, the order of discharge, it is presumed, will not free the bankrupt from the liability he has incurred or discharge him from process of imprisonment in default of payment (2). A discharge or the acceptance of a composition or scheme will not exempt the debtor from being proceeded against for any criminal offence, whether connected with insolvency or not (3).

An order of discharge releases the insolvent from all provable debts, but the power of the receiver to deal with property which vests in him does not cease with the passing of the order of discharge (4). Even the debts are not extinguished altogether, but the creditors are limited to their remedy for the purpose of realising the same from the assets vested in the court or receiver (5). In a Madras case the right of a creditor to realise a provable debt by proceeding against the insolvent's property was recognised in rather unusual circumstances. The facts were these: The creditor had obtained a money decree against the insolvent, having attached his property before judgment. Notwithstanding the attachment and contrary to it, the debtor alienated the property to some third person. Subsequently the debtor was adjudged insolvent and the creditor proved his debt due on the decree. In due course the debtor received his discharge. The creditor's right to proceed against the property after discharge was allowed (6).

Sometimes liability to pay a debt is accompanied by other collateral agreements. For instance, a mortgage-deed might contain a covenant that the mortgagor might seize and sell any after-acquired property of the debtor in satisfaction of the debt as security. As to how far such agreements are effected by an order of discharge the undermentioned cases may be consulted (7).

Sub-section (3).—An order of discharge does not release a partner, a co-trustee and a joint contractee or surety for the insolvent (8). An order of adjudication against a firm has the effect of adjudicating each individual partner in that firm insolvent. Both the joint and separate creditors should prove their claims. If the insolvent firm is subsequently discharged, a partner of that firm is not liable for a separate debt incurred by him prior to adjudication of the firm (9). A certificate of discharge granted to one of several joint grantors of an annuity discharges the bankrupt and

(1) *Re Gold*, 8 Morr. 45.

(2) *Bancroft v. Mitchell*, L. R. 2 Q. B. 549; *Exp. Graves*, 3 Ch. 642.

(3) Section 162, B. A., 1914; S. 135, P-t. I. A.; S. 71, P. I. A., 1920.

(4) *Kanshiram v. Hariram*, A. I. R. 1937 Lah. 87.

(5) *Arjandas v. Machia Talini*, A. I. R. 1936 Cal. 434; 166 I. C. 886; *Suka v. Ramachandra*, A. I. R. 1937 Nag. 171; *Khem Chand v. Hemandas*, A. I. R. 1937 Sind 306.

(6) *Doraiswami v. Aru Mugha*, A. I. R. 1936 Mad. 103; 159 I. C. 1027.

(7) *Thomson v. Cohen*, L. R. 7 Q. B. 527; *Lyde v. Mynn*, 4 Sim 505; *Collyer v. Isaacs*, 19 Ch. D. 342; *Robinson v. Ommannney*, 23 Ch. D. 285; *Exp. Nicholls*, 22 Ch. D. 782; *Wilmot v. Alton*, 1897, 1 Q. B. 17; *Exp. Moss*, 14 Q. B. D. 310; *Re Davis & Co.*, 22 Q. B. D. 193; *Re Reis*, 1904, 2 K. B. 769; *Re Lind*, 195, 2 Ch. 345.

(8) *Nazuk Rao v. Jajwant Rao*, 160 I. C. 603; 18 N. L. J. 145.

(9) *Aslaji Bhiraji Bros. v. Suni Lal*, 9 Mys. L. J. 222; *Heerji Jivraj v. Firm of Valabram Mulji*, 136 I. C. 815; A. I. R. 1932 Sind 39; *Exp. Yale*, 3 P. W. 24 n; *Exp. Hammond*, L. R. 16 Eq. 614; *Howard v. Poole*, 2 Str. 995.

not the others (1). A suit against the surety after the discharge of the principal debtor by a creditor of the insolvent lies, but a surety who is compelled to pay the creditor after the discharge of the debtor in insolvency proceedings is not entitled to recover the amount paid by him from the debtor inasmuch as the surety's liability is provable under section 34 and a discharge releases the debtor from that liability (2). **S. 44 (3).**

(1) *Baxtor v. Nichol*, 4 Taunt 90.

(2) *Ganga Dhar v. Kanhai*, 50 All. 606 : A. I. R. 1928 All. 306 : 109 I. C. 421.

METHOD OF PROOF OF DEBTS.

PART III.

ADMINISTRATION OF PROPERTY.

Method of proof of debts.

- 45.** **45.** A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors; deducting therefrom only a rebate of interest at the rate of six per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

History and analogous law.—This is section 29 of Act 3 of 1907 and corresponds to Schedule 2, rule 24, Presidency-towns Insolvency Act, Schedule 2, rule 21, B. A., 1883, and Schedule 2, rule 22 B. A., 1914.

The provisions relating to interest allowable in bankruptcy proceedings are contained in the present section, section 48, section 61 (6) and section 67. All of them are interconnected and they have been collected and considered under section 48 which is the main section. For complete notes refer to commentary under section 48.

- 46.** Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

History.—The section is an exact reproduction of section 30 of the Act III of 1907. In England long before the making of any statutory provision on the subject it was the practice in bankruptcy, where there was a debtor and creditor account between the bankrupt and another person, to take the account between them and adjust the balance due from the one party to the other (1). This, however, was not done where the debts were unconnected, with the result that if A owed B Rs. 1000, and B owed A Rs. 1,500, and B became bankrupt, A was bound to pay the whole of Rs. 1,000, which he owed to B and had to prove in the bankruptcy for Rs. 1,500 which B owed him and to accept

(1) *Young v. Bank of Bengal*, (1836) 1 M. I. App. 87 : 1 Moore. P. C. 150 ; 1 Dea. 622 ; *Chapman v. Darby*, (1712) 2 Vern. 117 : 23 E. R. 684.

such dividend as he could get on it. This led to great injustice, and to remedy the injustice there was legislation from time to time (1), first allowing a set-off in the case of mutual debts, and then extending it to the case of mutual credit. By section 39 of the Bankruptcy Act, 1869, the application of the principle of set-off was substantially extended by including mutual dealings, and the category of provable debts was at the same time enlarged. That section was reproduced with certain alterations in section 38 of the Bankruptcy Act, 1883. Section 38 of the Act of 1883, is re-enacted in section 31 of the Bankruptcy Act, 1914. The effect of the English section seems to have been widened from time to time according as successive statutes widened the clause providing for provable debts. S. 46.

Analogous law.—Sections 47, P-t. I. A., is the same as the present section, except that the former contains the following additional proviso :—

“Provided that the person shall not be entitled under this section to claim the benefits of any set-off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petition by or against him.”

The corresponding section 31, Bankruptcy Act, 1914, runs as follows :—

“Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively ; but a person shall not be entitled under this section to claim the benefit of any set off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him.”

The insolvency rules in regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities, future, contingent liabilities the rights of proving creditors against the estate of the bankrupt and the claims of the estate against such creditors are applicable to insolvent companies in the course of winding up (2). The rules of set-off in the case of insolvent companies are almost the same as those prevailing in bankruptcy of an individual, except for a few differences. For instance, there can be no set-off between a contributory and the company ; they must first pay all calls, and may then prove and receive dividend rateably with the other creditors (3) ; unless the con-

(1) *Re Daintrey*, (1901) 1 Q. B. 546, 573.

(2) Section 262, Companies Act, 1929, (English) ; S. 229, Indian Companies Act, 1913.

(3) *Grissell's case*, L. R. 1 Ch. 528 ; *Calisher's case*, L. R. 5 Eq. 214 ; *Black & Co's case*, L. R. 8 Ch. 254 ; *Barnett's case*, L. R. 19 Eq. 449 ; *Re Whitehouse & Co.*, 9 Ch. 595 ; *Re Washington Diamond Mining Co.*, (1893) 3 Ch. 95 ; *Re Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70 ; *Re Westcoast Goldfields, Ltd.*, (1906) 1 Ch. 1.

3. 46. tributary is bankrupt in which case the set-off may be claimed whether the claim be in the bankruptcy or in the winding-up (1). The case of a bankrupt contributory appears to be the only exception to the rule that there can be no set-off against calls. Thus where there are two companies in liquidation and one is indebted to the other for call and that other to the first company for a debt, there can be no set-off (2) nor can any dividend be received on the debt till all the calls have been paid (3).

A contributory does not get the benefit of this section unless and until he is bankrupt, and cannot therefore rely on a set-off for a debt due from the company as an answer to a bankruptcy notice founded on a judgment for calls (4), nor can he set-off a debt due to him from the company, before the winding-up against his liabilities under an order made in the winding-up to repay a sum paid to him under circumstances amounting to a fraudulent preference (5).

Set-off under the Code of Civil Procedure.—The law of set-off in suits between solvent parties is governed in England by the Statutes of Set-off (2 Geo. 11 C. 22, S. 13, and 8 Geo. 11 C. 24, S. 4) and by O. 8, r. 6, C. P. C., in India. O. 8 r. 6, C. P. C., runs as follows :—

“(1) Where in a suit for the recovery of money, the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both, parties fill the same character as they fill in the plaintiff's suit, the defendant may at the first hearing of the suit, but not afterwards, unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

“(2) The written statements shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claims and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.”

Apart from the legal set-off provided for in the above quoted rule there is recognised in India, following the English Law, what is called an equitable set-off. These are cases where the cross demands arise out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction (6). In an equitable set-off, the defendant's claim, though barred by limitation at the date of the suit and not falling under O. 8, R. 6, C. P. C., may be entertained (7).

(1) *Re Dickworth*, L. R. 2 Ch. 578; *Exp. Strang*, L. R. 5 Ch. 492.

(2) *Re Auriferous Properties, Ltd.*, (1898) 1 Ch. 691.

(3) *Re Auriferous Properties, Ltd.* (2), (1898) 2 Ch. 428.

(4) *Re G. E. B.*, (1903) 2 K. B. 340.

(5) *Re A Debtor*, (1927) Ch. 410.

(6) *Clark v. Ruthnavaloo*, (1865) 2 Mad. H. C. 296, (the leading case on the subject); *Kishore Chand v. Madhoji*, (1880) 4 Bom. 407; *Bhagat v. Bamdeb*, (1885) 11 Cal. 557.

(7) *Ramdhari Singh v. Permanund*, (1913) 19 C. W. N. 1183; 21 I. C. 761; *Parasurama v. Venkatachalam*, (1913) 21 I. C. 701; 25 M. L. J. 561; *Sheosharan v. Mohabir*, (1905) 32 Cal. 576. The last two are cases of

Difference between the law of set-off in bankruptcy and between solvent parties.—**S. 46.** The difference was thus explained by Parke, B., in an English case (1) :—

"The right of set-off in bankruptcy does not appear to rest on the same principle as the right of set-off between solvent parties. The latter is given by the Statutes of Set-off (2 Geo. IIc. 22, S. 13, and 8 Geo. II c. 24, S. 4) to present cross-actions, and if the defendant could sue the plaintiff for a debt due to him, not in his representative character, he might set it off under these statutes in an action by the plaintiff suing in his individual character also, though the plaintiff, or defendant, might claim their respective debts as trustee for a third person. If the debts were legal debts, due to each in his own right, it would be sufficient. But under the bankruptcy statutes the mutual credit clause has not been so construed. The object of this clause (originally introduced in a temporary Act, 4 and 5 Anne, c. 17, continued by 5 Geo. II c. 30, and now re-enacted by 6 Geo IV c. 16) is not to avoid cross-actions, for none would lie against assignees and one against the bankrupt would be unavailing, but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate; and the Court of King's Bench, in considering this clause, has held that it did not authorise a set-off where the debt, though legally due to the debtor from the bankrupt, was really due to him as trustee for another, and though recoverable in a cross-action, would not have been recovered for his own benefit."

Difference between the law under the Presidency-towns and English Acts and the Provincial Insolvency Act.—In the English section there are the additional words "mutual credits, mutual debts or other" immediately preceding the words "mutual dealings." These additional words are there, due to the history of the law of set-off in bankruptcy in England. At first set-off was restricted to mutual debts only. Later on mutual credits were also included and lastly by the enactment of the words 'mutual dealings' the scope of the section was extended so as to include nearly all provable debts. In the Indian Acts these additional words do not occur but there is no difference in scope. Under section 47, P-t. I A., 1909, credits and dealings entered into after the creditor had notice of the presentation of an insolvency petition are excluded from the section. Under the English Act, dealings entered into after notice of an available act of bankruptcy are similarly excluded. Under the Provincial Insolvency Act there is no similar provision. Apparently it seems that credits given to the debtor upto the time of the order of adjudication shall be allowed to be set off even if the creditor at the time of giving credit had notice of the act of bankruptcy or the presentation of the insolvency petition. This conclusion finds support from the difference in language between S. 46, P-t. I. A., and S. 30, B. A., 1914, on the one hand and S. 34, P. I. A., 1920, on the other. Under S. 46, P-t. I. A., debts given after the notice of the presentation of the insolvency petition are not provable. Similarly under S. 30, B. A., 1914, a person who advances a sum of money to an insolvent after having notice of any act of bankruptcy available against the debtor cannot prove that debt in insolvency. The scope of section 34 is, however, wider and, as we have seen, debts contracted after the dates of act of

(1) *Forster v. Wilson*, 12 M. & W. 191.

46. bankruptcy or presentation of petition, but before the order of adjudication are provable in insolvency of the debtor (1).

Object of the section.—Lord Kenyon made the following remarks in the English case of *Dickson v. Evans* (2) :—

“The words of the Statute 5 Geo. 11 c. 30, S. 28, are express that if it shall appear to the Commissioner that there has been mutual credit given by the bankrupt, or mutual debts between the bankrupt and any other person at any time before bankruptcy, the Commissioner shall state the account etc., and what shall appear to be due etc., shall be claimed or paid. That Act was founded on good sense ; and it provides that the assignees shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. That is the justice of the case, but it would be most unjust, indeed, if one person who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation by one of the parties.”

Again, to quote from the learned judges who decided A. I. R. 1914 Lahore 317. “The right of set-off is a doctrine of equitable jurisdiction and its object is not merely to avoid cross-actions but to do substantial justice. Therefore, this doctrine would apply to prevent the great injustice which would arise if a person who is the insolvent’s creditor on one account and his debtor on the other is compelled to pay sixteen annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him, but it cannot be extended to cover cases where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys up a third person’s claim against the insolvent in order to relieve himself of the liability of having to pay his just debts.”

The principle to be deduced from the above quotations is that the court of bankruptcy shall in settling as to what is due from a creditor to the insolvent estate and *vice versa*, act as a court of equity and do substantial justice in the absence of fraud.

Date on which account shall be taken.—The material date on which the accounts between the proving creditor and the insolvent’s estate shall be taken is the date of order of adjudication (3). Thus no judgment-debtor can be permitted to place himself in a more favourable position *vis à vis* his fellow-debtors by purchasing, after adjudication, the liabilities of the insolvent and then setting off his rights thus secured against his original debts to the insolvent’s estate. Recognition of such a transaction would cut at the root of all the canons of insolvency law.

(1) See commentary under S. 34 *ante*.

(2) 3 E. R. 119 : 6 Term Rep. 57 (cited in *Radha Kishan v. Firm of Ganga Ram-Radha Kishan infra*.)

(3) *Chengalvaraya v. The Official Assignee, Madras*, 33 Mad. 467 : 5 I. C. 379.

S. 46.

Such a transaction should not be recognised also on the ground that the words "mutual dealings" referred to in S. 47, P-t. I. A., (corresponding to S. 46, P. I. A., 1920) refer to mutual dealings at the time of the insolvency, and cannot refer to a purchase by one of the debtors of a claim against the insolvent long after the insolvency (1). One object of the Act (*i.e.*, English Act, 5 Geo. 2 c. 30) was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy and then pretending that he was a creditor at the time of the bankruptcy (2). The line is drawn at the time of bankruptcy and the rights of the parties are not to be altered by subsequent transactions (3). Under the English Act the date of the receiving order, and not the date of commencement of the bankruptcy, has been held to be time for ascertaining what mutual dealings, capable of being made the subject of set-off under the section, exist between the debtor and the creditor. In *re Daintrey* (4), the case was that the debtor, being indebted to Messrs. Mant in £ 86 on 24th Dec. 1892, committed an act of bankruptcy of which Messrs. Mant had no notice. On 31st December the debtor sold his business to Messrs. Mant under an agreement which fixed as the price a portion of the profits expected to be earned for 3 years from the business sold, and Messrs. Mant took possession of and carried on the business. On 17th January, 1893, a receiving order was made but no profits had then been earned. At the end of the 3 years, £ 300 was found to be due from Messrs. Mant under the agreement as the price of the business and this sum was paid by them to the trustee in bankruptcy, less the £86 due to them. The Court of Appeal held that it was "quite sufficient if the account can be taken when the set off arises" and that there having been "mutual dealings" at the date of the receiving order, Messrs. Mant were entitled to set-off the £86 against the £ 300. This case was followed in *Re Taylor* (5), where Buckley, Lord Justice, said: "There were debts in respect of a contract existing at the date of the receiving order and by virtue of section 38" (corresponding to this section) "there is necessarily a statutory set-off."

Mutual credits.—In the English Act the words mutual debts and mutual credits also occur. In the Indian Acts there is only one expression "mutual dealings" but the intention of the Indian statutes is identical with the intention of the English Acts. It will therefore be useful to consider the meaning of the expression "mutual credit" and the distinction between mutual credits and "mutual debts". The leading English case is *Rose v. Hart* (6). For some time previous to the leading case of *Rose v. Hart*, the term "mutual credit" received a very wide interpretation; but, by the above leading case, the interpretation was considerably narrowed. There it was held that the Legislature meant such "credits" only as *must*, in their nature, terminate in debts. The interpretation was again widened

(1) *Ma Yait v. Official Assignee*, A. I. R. 1931 Rang. 193 (1) : 9 Rang. 373 : 131 I. C. 726, on appeal from *Official Assignee v. Ma Yait*, 8 Rang. 419 : A. I. R. 1931 Rang. 25 ; *Radha Kishan v. F. O. Gangaram Radha Kishan*, 23 I. C. 927 : A. I. R. 1914 Lah. 317.

(2) *Dickson v. Evans*, (1794) 3 E. R. 19.

(3) Dictum of Lord Selborne in *In re Milan Tramways Co.*, (1884) 25 Ch. D. 587, quoted with approval and followed in *re Daintrey*, (1900) 1 Q.B.D. 546.

(4) (1900), 1 Q. B. D. 546.

(5) (1910) 1 K. B. 562.

(6) 2 Sm. L. Cases, 12th Edition, 27.

46. in *Easum v. Cato* (1) where the court held that it was enough if the transaction would *most likely* end in a debt and it has also been decided by the Court of Appeal that the right of set-off only accrues where the claims on each side are such as result in pecuniary liabilities so that an account may be taken and the balance struck (2). In this case a set-off against a claim in detinue was disallowed. It was, however, distinguished in *Palmer v. Day* (3), where a mutual credit was held to arise between auctioneers and the bankrupts who had instructed them to sell certain property and become liable to them for their charges in connection with such sale, and had subsequently delivered to them other property with an authority to sell, which had never been revoked. The point is not quite free from difficulty and there does not appear to be a unanimity of opinion in the decided cases. Where a debt is due from one party and credit given by him on the other hand for a sum of money payable at a future day, and where there is a debt on one side, and a delivery of property with directions to turn it into money on the other are cases where the section will clearly apply. Where, however, there is a mere deposit of property without any authority to turn it into money no debt can arise out of it, and therefore it is not a credit within the meaning of the statute. In *Young v. Bank of Bengal* (4) it was held that a deposit, with power, in case of default, to sell and pay over the surplus, does not, until default, amount to a credit to the depositary, such deposit being only *in prasenti* a bailment. The contrary appears to have been held in another English case where a deposit of bills with an authority to receive the amount at maturity, even though such authority be revocable, was held, until revoked, to be giving credit to the depositary (5). The same principle was followed in *Astley v. Gurney* (6), where there was an irrevocable power to sell because, it was coupled with an interest.

In India the narrower interpretation that a mutual credit must in its nature terminate in a debt was followed by the Calcutta High Court (7). The wider interpretation was, however, followed by the Madras High Court and the Calcutta view was expressly dissented from; and it was held that claims in respect of bills discounted for the insolvent before insolvency and dishonoured by the makers after insolvency, could be set-off under section 39 of the Indian Insolvency Act (8).

This section is applicable where the mutual dealing results in a debt which is not only contingent but also conditional. The case of *Re Daintrey* (9) is an illustration of the proposition because in that case the debt of £ 300 was a debt whose existence and amount were alike contingent at the date of the receiving order. Further, the liability to pay the £ 300 was conditional, although the report does not disclose what the conditions were (10). In *Ellis and Co's trustee v. Dixon-Johnson*

(1) 5 B. & A. 861.

(2) *Eberle's Hotels Co., v. Jones*, 18 Q. B. D. 459.

(3) (1895) 2 Q. B. 618.

(4) 1 Moore's P. C. 150.

(5) *Naarogi v. The Chartered Bank of India*, L. R. 3 C. P. 444.

(6) *Astley v. Gurney*, L. R. 4 C. P. 714.

(7) *A. B. Miller v. The National Bank of India*, 19 Cal. 146.

(8) *In the matter of C. I. Canthom & Co.*, 33 Mad. 55 : 5 I. C. 845.

(9) (1900) 1 Q. B. 546.

(10) *Re Daintrey supra*, pages 572, 573, *per* Lindley, M. R.

(1) the facts were somewhat unusual. A firm of stockbrokers with whom a client had opened a speculation account covered by a deposit of securities, in breach of their agreement sold, during the currency of the account, a part of the security, and subsequently became bankrupt. The trustee, on discovering the true facts, informed the client and demanded payment of the balance due on the account, in which credit was given for the converted securities at the market price ruling on the date when they had been sold. Payment was refused, and the trustee brought an action in which the credit item was taken alternatively at the market prices ruling on three different dates, namely, the date of the conversion, the date of the receiving order and the date when the conversion was brought to the knowledge of the client. On these facts it was held by P.O. Lawrence, J., that the principle under which a court of equity will restrain a mortgagee who has parted wrongfully with the mortgaged property from suing the mortgagor on his covenant is applicable where the mortgaged property consists of shares readily obtainable on the open market and is not confined to a mortgage of a legal or equitable interest in land, but, that as the trustee in bankruptcy had been no party to the conversion, and shares identical with those converted which represented only a fraction, namely, 2/15ths, of the whole property pledged, could be bought on the market, the principle ought not to be inflexibly applied; and that an account should be taken as between the trustee and the client in which credit should be given to the latter for value of the shares taken at the market price ruling on the date immediately before that on which the master's certificate was signed. S. 46.

Distinction between "mutual credit" and "mutual debt".—The nature of the distinction between "mutual debts" and "mutual credits" is thus described by Lord Brougham, in a judgment delivered by him in *Young v. The Bank of Bengal* (2). "Now, although, generally speaking, debt and credit are correlative terms, and A giving credit to B may seem to imply that B is indebted to A, yet it may be admitted that the introduction of the words "mutual credit" extends the right of set-off to cases where the party receiving the credit is not a debtor in *praesenti* to him who gives the credit. Accordingly, the relation contemplated by the statute has been held to be established, where the debt is immediately due from the one party and only due on a future day from the other. It was so held in *ex parte Prescott*, 1 Atk. 230, where the mutual credit was constituted by simple contract debts presently due on the one side and a specialty debt not due on the other."

Mutual debt, mutual credit and mutual dealings may exist independently of any intention to create a right of set-off. Thus, taking an acceptance of the bankrupt from a third person (3) or taking an acceptance of a third person by endorsement from the bankrupt (4), is giving credit which may be set off against a debt due to the bankrupt.

Mutual dealings.—As the expression itself indicates, there should be dealings between the bankrupt and the person proving against his estate and that the dealings should be mutual between the parties. We

(1) (1924) 1 Ch. 342, affirmed by a majority of the Court of Appeal, Pollock, M. R., Dissentiente, in (1924) 2 Ch. 451, and by the House of Lords, in 1925 App. Cas. 489.

(2) 1 Moore's P. C. 150.

(3) *Hankey v. Smith*, 3 T. R. 507; *Collins v. Jones*, 10 B. & C. 771; *Bolland v. Mash*, 8 B. & C. 105.

(4) *Alsager v. Currie*, 12 M. & W. 751.

S. 46. shall consider the subject under separate headings, which are as follows :—

I. (a) What may be the subject of set-off

(b) What may not be the subject of set-off.

II. (a) The debt, credit or dealing should be between the same parties; (b) they must be due respectively in the same right ; and (c) exceptions to the rule that the right to set-off must be mutual ;

What claims may be set off.—The words “mutual dealings” are wide enough to include every case of provable claims. In the English Act of 1849, there were express words making provable debts the subject of set-off. In the subsequent Acts of 1869, 1883, and 1914, there are no express words to that effect, yet the law is the same (1). The words include case, where the person owes a debt to another, but has a claim against the other for unliquidated damages for breach of contract. The right of set-off thus extends to all claims for unliquidated damages, provided they are provable in insolvency (2). Thus damages for breach of a lessor’s covenant may be set-off against a claim for rent (3). Similarly damages for non-delivery of goods under a contract may be set-off against the price of goods already delivered under the contract (4). The right of proof, and consequently the right of set-off, extends not only to breaches of contract, but to breaches of obligations arising out of contract. Thus it has been held that unliquidated damages for fraudulent misrepresentation by the bankrupt on sale of goods can be the subject of set-off, on the ground that the claim of the trustee being for the price of the goods, the misrepresentation which led to their purchase was a mutual dealing as between the purchaser and the bankrupt vendor (5). Where a sale of goods upon credit was induced by the fraud of the purchaser, who pledged the goods with a pawnbroker, and after the purchaser had paid part of the price, a receiving order was made against him and the vendor re-took possession of the goods upon payment to the pawn broker of the sum advanced upon them, it was held that the vendor was entitled to set off the damages caused by the fraud of the bankrupt, namely, the sum paid to the pawnbroker to redeem the goods, against the claim of the plaintiff to recover the amount paid on account of the purchased price (6).

(1) *Booth v. Hutchinson*, L. R. 15 Eq. 30, *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567; *Palmer v. Day*, (1895) 2 Q. B. 618; *Re Daintrey*, (1900) 1 Q. B. 546; *Re Rushforth*, 85 L. T. 807.

(2) *Booth v. Hutchinson*, (1873) 15 Eq. 30; *Palmer v. Day*, (1895) 2 Q. B. 618; *Jeffery v. Official Assignee of Rangoon*, A. I. R. 1923 Rang. 111; 109 I. C. 695; 6 Rang. 46; *Krishna Chandra Bhounick v. Pabna Dhanabhandar*, 155 I. C. 991; 62 Cal. 298; A. I. R. 1935 Cal. 225.

(3) See (2) above.

(4) *Peat v. Jones*, (1881) 8 Q. B. D. 147.

(5) *Jack v. Kipping*, (1882) 9 Q. B. D. 113, s. c. in appeal *Mersy Steel and Iron Co. v. Naylor & Co.*, (1884) 9 App. Cases. 434. See also *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567, 572.

(6) *Tilley v. Bowman, Ltd.*, (1910) 1 K. B. 745.

The fact that the cross-claims are of a different nature, as that one arises on a deed and the other on a simple contract, does not matter (1). Nor is it material that the one claim is legal and the other equitable or that the one debt is secured and the other unsecured (2). In the case of a set-off of a secured debt the effect of set-off is equivalent *pro tanto* to payment, so that if the amount of set-off be equal to the debt for which the security was given, the debt being put an end to, the security would also be put an end to (3). The circumstance that the creditor has collateral security for a debt due to him from the bankrupt does not destroy his right of set-off (4).

What claims may not be set off.—Money given for a specific purpose which has not been carried out cannot be set off. Thus, where a man gave his solicitor money for future costs, which, by reason of bankruptcy supervening, never became payable, it was held that such money could not be set off by the solicitor against a debt for costs previously incurred (5). If a balance remains after satisfying the purpose for which the money was paid, such balance cannot be set off unless it can be shown that there was consent to its remaining in the hands of the payee (6). Where an insolvent company made a payment to a director which was set aside as a fraudulent preference at the instigation of the liquidator it was held that the director must repay in full without deducting a judgment-debt due to him by the company before the liquidation (7). In another case, in October, 1908, a debtor holding debenture stocks in the petitioning creditor company claimed to be entitled to set this off against the petitioning creditor's debt. In November following, but before the petition was disposed of, a receiver was appointed on behalf of another creditor of the debtor's interest in the debenture stock. It was held that an essential change was effected by the appointment of the receiver, that thenceforward there were no mutual credits between the petitioning creditors and the debtor, and though the effect of adjudication in bankruptcy would be to defeat the title of the receiver and give a title to the trustee, that would not suffice to bring section 38 of the Act of 1883, (corresponding to this section) into force, and consequently the petitioning creditors were entitled to a receiving order (8). Costs given in bankruptcy can only be set off against other bankruptcy costs. Where a debtor had been ordered to pay to the creditor the costs of an unsuccessful application to set aside the bankruptcy notice, and the creditor included those costs as part of the petitioning debt, and the petition was dismissed with costs, the creditor was not allowed to set off the latter costs against those which the debtor had been ordered to pay (9).

Debts, Credits, and dealings must be between the same parties.—In order that there may be mutuality it is necessary that the dealings must be between the same parties. Thus a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt, nor a debt due from three partners against a debt due to two of them, or the like (10). The

(1) *Exp. Law*, De Gex, 378.

(2) *Mathieson's Trustee v. Burrup*, *Mathieson & Co.*, (1927) 1 Ch. 562.

(3) *Exp. Barnett*, L. R. 9 Ch. 293.

(4) *McKinnon v. Armstrong*, 2 A. C. 531.

(5) *Re Pollitt*, (1893) 1 Q. B. 455.

(6) *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567.

(7) *Re A Debtor*, (1927) 1 Ch. 410.

(8) *Re A Debtor*, (1909) 1 K. B. 430.

(9) *Re A Debtor*, (1907) 2 K. B. 896.

(10) *Exp. Ross*, Buck. 125; *Staniforth v. Fellowes*, 1 Marshall. 184; *Exp. Twogood*, 11 Ves. 517.

- S. 46.** dealings of a person on deposit account and on a promissory note executed by him jointly with another are of a different character and so cannot come within the term 'mutual dealings' (1). Similarly, moneys due by a bank under liquidation under the joint account cannot be set off against dues due under a personal account (2). A debtor of a firm, whose affairs were being liquidated by arrangement under the Act of 1869, was held not to be entitled to set off against his debt to the firm debts due to him from the separate members of the firm, in the absence of any agreement making the firm liable for them (3). So, where one of several co-debtors became bankrupt and an action was brought against them to recover the joint debt, it was held that the mutual credit clause did not enable them to plead as a set-off a cross-debt due from the plaintiff before such bankruptcy (4).

Debts must be in the same right.—Debts cannot be set-off unless they are due to and from the same persons in the same right (5). Thus a debt due to an executor *qua* executor cannot be set off against a debt due from him in his own right (6); nor can a debt due to a wife *dum sola* be set off against a debt due from the husband (7). A debt due to or from the trustee in bankruptcy, and arising after the bankruptcy in re-management of the estate, cannot be set off against a debt due from or to the bankruptcy (8). And the rule extends even to cases where the trustee claims in respect of a debt arising after the bankruptcy on a contract made by the bankrupt before his bankruptcy (9). It shall not, however, apply where the set-off is claimed in respect of the same contract as that on which the debt arose after bankruptcy, which the trustee is seeking to enforce (10). If a payment is made by a husband to his wife before insolvency, and the transaction is set aside as a voluntary settlement, and the official assignee claims the amount from the wife, the wife cannot set off a debt due to her from her husband against the claim of the official assignee. The reason for this is that the amount is payable to the official assignee not because it was a debt due to the insolvent but because it was payable to the official assignee *qua* official assignee on the setting aside of the transaction (11).

The general rule that the debts must be due in the same right is subject to certain exceptions. One exception is that a set-off of claims arising in different rights will be allowed where the person claiming the benefit can show some equitable ground for being protected against the legal demand (12). Thus where proof is made against the estate of a defaulting trustee who is also beneficially entitled to part of the trust fund

(1) *Trimbak Gangadhar v. Ramchandra Trimbak*, 63 I. C. 906 : 45 Bom. 1219 : 23 B. L. R. 537 : A. I. R. 1921 Bom. 66.

(2) *Alliance Bank of Simla v. Mohan Lal*, 101 I. C. 762 ; 8 Lahore 105 : 28 P. L. R. 427 : A. I. R. 1927 Lahore 228.

(3) *Tyso v. Pettitt*, 40 L. T. 132. Compare *Re Pennington & Owen, Ltd.*, 1925 Ch. 825.

(4) *New Quebrada Co. v. Carr*, L. R. 4 C. P. 651.

(5) *West v. Pryce*, 2 Bing 455 ; *Groome v. Mealey*, 2 Bing N. C. 138.

(6) *Bishop v. Church*, (1748) 3 Atk. 691 : 26 E. R. 1197.

(7) *Exp. Blagden*, 2 Rose 249.

(8) *West v. Pryce*, 2 Bing. 455 ; *Alloway v. Steere*, 10 Q. B. D. 22.

(9) *Ince Hall Rolling Mills Co. v. Douglas Forge Co.*, (1882) 8 Q. B. D. 179.

(10) *William's Bankruptcy Practice*, page 182, 14th Edition ; see also *Mangles v. Dixon*, 3 H. L. C. 702.

(11) *Lister v. Hooson*, (1908) 1 K. B. 174.

(12) *Middleton v. Pollock*, L. R. 20 Eq. 29.

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for the amount of the fund which has come to his hands, the amount of the bankrupt's beneficial interest must be set off and deducted from the proof (1). It is sufficient that the debts may be due in equity in the same right, though they may not be legally so. Where a bankrupt stopped payment, and the trustee brought an action against a customer to recover the amount for which his account was overdrawn, the customer was allowed to set off a sum due to him on an account which he had owed to him as executor, but to which, as residuary legatee, he was beneficially as well as legally entitled, since, although all the charges on the residuary estate were not satisfied, he had, as executor, in his possession ample funds out of which to satisfy them (2). So where the trustee in a bankruptcy, which was afterwards annulled, had paid a sum of money, the proceeds of the sale of the bankrupt's estate, into a bank to his account as such trustee and the partners in the bank into which the money was so paid afterwards but, before annulment, became bankrupts, it was held in an action by the trustee in the bankruptcy of the partners against the person whose bankruptcy had been annulled for a sum due from him to the bank, that the defendant was entitled to set off against the claim of the trustee the amount which had been paid into the bank by the trustee in the annulled bankruptcy of the defendant (3). Where, however, a brother and sister kept an executorship account in their joint names with a bank where the brother, who was residuary legatee, kept a private account, and there were outstanding claims for which the executors were jointly liable, and the bankers failed, and at that the time of filing the petition the private account was overdrawn, but the joint account had a balance to its credit, it was held that the two accounts could not be set off against each other. There the law was laid down by Brett, L. J., in the following words :—

"The account standing in the names of the brother and sister, the case could not have been brought within the rule of equitable set-off or mutual credit, unless the brother was so much the person solely beneficially interested that the court of equity, with ut any terms or any further inquiry, would have obliged the sister to transfer the account into her brother's name alone" (4).

Another exception is where a factor sells goods in his own name for an undisclosed principal. In such a case the buyer, in the event of the factor's insolvency before the goods are paid for, may set off a debt due to him from the factor personally against the principal's claim for the price of the goods, as if the factors were the principals. Thus brokers on a commission *del credere*, effecting the policies in their own names as apparent principals, were allowed to set off premiums due to the underwriters of such policies, against unpaid losses due from the underwriters (5). The buyer, however, in order to obtain the benefit of the set-off must, in making the contract, have been induced by the conduct of the principal to believe, and must in fact have believed, that the agent was selling on his own account (6). On the same principle a debt due to an agent on a contract, on behalf

(1) *Exp. Turner*, 2 Detl. M. & G. 927 ; *Re Chapman*, 4 Mor 109.

(2) *Bailey v. Finch*, L. R. 7 Q. B. 34.

(3) *Bailey v. Johnson*, L. R. 7 Ex. 263.

(4) *Ex. Morier*, 12 Ch. D. 491.

(5) *Koster v. Eason*, 2 M. & S. 112; *Cumming v. Forrester*, 1 M. & S. 494.

(6) *Cooke v. Eshelby*, 12 A. C. 271.

46. of a concealed principal, may be set-off by him against a debt due from him in his own person ; for in such a case the agent is himself a contracting party, and liable personally on the contract, although the principal may also be liable, when discovered, and, as the agent suffers the disadvantage, he is entitled to the benefit of his privity of contract with the bankrupt (1). In the bankruptcy of the buyer the trustee in bankruptcy can set off a claim of the bankrupt against the factor against the debt of the undisclosed vendor. It is immaterial that the factor, in dealing in his own name, acts contrary to his principal's express instructions (2). On the same equitable principles a debtor will be allowed to set up against the claims of an assignee of a debt claims of his against an assignor under the contract out of which the debt arose, and that even though the claim so sought to be set up had not ripened into a debt at the time of the assignment (3).

Exception to the rule that the right to set-off must be mutual.

—Generally a claim, which is capable of being set off by one side, will afford a mutual credit, against which the other side could, if necessary, set off its provable claims. In other words, claims must generally be within the mutual credit clause for both debtor and creditor, or for neither ; and a claim cannot both be and not be subject to the mutual credit clause. There is, however, one exception to this rule and it arises from the rule that a man should not take advantage of his own wrong. A depositary without power of sale cannot, if he wrongfully sells, treat the pawnor's right to recover damages for the breach of trust as a credit by the pawnor to him, for he cannot take advantage of his own wrong ; but the pawnor might, nevertheless, set off the damages to which he might be entitled for the breach of trust against a credit given to him by a depositary, since, if he chooses, he may waive the tort (4).

Agreement to exclude the section.—No agreement can prevail so as to exclude the operation of the section. The effect of the mutual credit section is the result of a special statutory enactment, which cannot be overridden by the consent of the parties (5).

Meaning of 'due'.—The word 'due' in section 46 means legally recoverable and not 'justly due.' Hence the official receiver has no right to set off against a creditor's claim a time-barred claim of the insolvent against the creditor (6).

Set-off for costs.—Untaxed costs, though provable in insolvency, cannot be the subject of set-off against costs in another court, and though the parties to the proceedings may be the same. If a set-off were allowed,

(1) *Lee v. Bullen*, 27 L. J. Q. B. 161 ; *Koster v. Eason*, 2 M. & S. 112 ; *Cumming v. Forrester*, 1 M & S. 494. (In these cases brokers, on a commission *del credere*, effecting policies in their own names as apparent principals, were allowed to set-off premiums, due to the underwriters on such policies, against unpaid losses due from the underwriters.)

(2) *Exp. Dixon*, 4 Ch. D. 133.

(3) *Mangles v. Dixon*, 3 H. L. C. 702.

(4) *Exp. Eyre*, 1841, 2 M. D. & D. 66.

(5) *Exp. Fletcher*, 6 Ch. D. 350, opinion of Bacon, C. J. ; *Exp. Barnett*, L. R. 9 Ch. 293, *per* Lord Selborne, L. C.

(6) *Gopala Krishna Aiyar v. Official Receiver of South Malabar*, A. I. R. 1930 Mad. 998 : 128 I. C. 879.

no debtor could get a solicitor to act for him in insolvency proceedings, because to allow the set-off is to defeat the solicitor's lien for costs. Thus if a judgment-creditor presents an insolvency petition against the debtor, and the petition is dismissed with costs, the judgment cannot be set off against the costs of the petition (1), but the costs of proceedings in the insolvency court can be set off against costs of other proceedings in the same court (2).

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Effect of notice of presentation of petition—See commentary under heading "Analogous Law."

Set-off in case of companies in liquidation.—See commentary under heading "Analogous Law."

Miscellaneous.—The bankruptcy rules of set-off have been held to apply to the administration of the estate of a deceased insolvent (3).

47. (1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured-creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

(1) *Exp. Griffin*, (1880) 14 Ch. D. 37; *Re Drummond*, (1909) 2 K. B. 622; *Re Bassett*, (1896) 1 Q. B. 219.

(2) *Re A Debtor*, (1907) 2 K. B. 896.

(3) *Watkins v. Lindsay*, 57 L. J. Q. B. 362.

47. **History.**—The section reproduces word by word section 31 of the Act III of 1907.

Analogous law.—The rules of proof by secured creditors in the Presidency-towns Insolvency Act are to be found in Schedule 2, rules 9 to 18. Under the English law the corresponding provisions are Schedule 2, Rules 9 to 16 of the Act of 1883, and Schedule 2, Rules 10 to 18 of the Act of 1914. The provisions of the Presidency-towns Insolvency Act are almost the same as those under the English Acts, except that in the former Act, a special procedure for inquiry into mortgages is provided in Rule 18 of the second Schedule. Besides the provisions of the Provincial Insolvency Act, those Acts contain the following additional rules :—

R. 12 (2), P-t. I. A. If the official assignee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the official assignee, or as, in default of agreement, the Court may direct. If the sale is by public auction, the creditor, or the official assignee on behalf of the estate, may bid or purchase :

Provided that the creditor may at any time, by notice in writing, require the official assignee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the official assignee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it ; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the official assignee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued (1).

Rule 13, P-t. I. A. Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the official assignee, or the Court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the official assignee shall allow the amendment without application to the Court (2).

Rule 14, P-t. I. A. Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he has received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend, any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment (3).

(1) Sch. II, R. 12, B. A., 1883 ; Sch. II, R. 13, B. A., 1914.

(2) Sch. II, R. 12, B. A., 1883 ; Sch. II, R. 14, B. A., 1914.

(3) Sch. II, R. 14, B. A., 1883 ; Sch. II, R. 15, B. A., 1914.

Rule 17, P-t. I. A. Subject to the provisions of rule 12, a creditor shall in no case receive more than sixteen annas in the rupee and interest as provided by this Act (1). S. 47.

Rule 18, P-t. I. A. Upon application by any person claiming to be a mortgagee of any part of the insolvent's real or leasehold estate and whether such mortgage is by deed or otherwise, and whether the same is of a legal or equitable nature, or upon application by the official assignee with the consent of such person claiming to be a mortgagee as aforesaid, the Court shall proceed to inquire whether such person is such mortgagee, and for what consideration and under what circumstances; and if it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and of the rents and profits, or dividends, interest or other proceeds received by such person or by any other person by his order or for his use in case he has been in possession of the property over which the mortgage extends, or any part thereof, and the Court, if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court thinks fit, when and where, and by whom and in what way the said premises or property, or the interest therein so mortgaged, are to be sold, and that such sale be made accordingly, and that the official assignee (unless it is otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application. At any such sale, the mortgagee may bid and purchase.

We shall see below as to which of the above quoted rules are applicable in principle to matters arising under the Provincial Insolvency Act.

Rights of secured creditors generally, and official receiver's rights in respect of mortgage property.—It is provided by section 28, sub-section 6 that an order of adjudication shall not affect the power of a secured creditor to realise or otherwise deal with his security. A secured creditor stands outside the bankruptcy (2). He can ignore the bankruptcy proceedings altogether and proceed to realise or deal with his security as if there had been no bankruptcy. He may rely on his security, or, as it is said, "sit upon his securities" (3), for the payment of his debt. What vests in the official assignee or receiver is the right, title or interest of the insolvent which is left after the rights of the secured creditor have been allowed for. The receiver cannot deal with the property of the insolvent, which is subject to a mortgage, charge or lien, by ignoring such encumbrance. The matter has been considered in detail under section 28 (6). See commentary under that section.

Who is a secured creditor?—The expression 'secured creditor' has been defined in section 2 (1) (e) as meaning a person holding a mortgage, charge or lien on the property of the debtor or any part thereof, as a security for a debt due to him from the debtor. We have noticed cases where a creditor is a secured creditor under that section and section 28,

(1) Sch. II, R. 16, B. A., 1883; Sch. II, R. 18, B. A., 1914.

(2) *White v. Simmons*, (1871) L. R. 6 Ch. App. 555, 557.

(3) *Re Savin*, (1872) L. R. 7 Ch. App. 760, 765; *Hans Raj v. Official Liquidator*, (1929) 51 All. 695; 119 I. C. 273; A. I. R. 1929 All. 353.

47. sub section (6). Here may also be given some instances where a person has been held to be a secured creditor.

(a) An agreement was entered into between the appellant (creditor) and respondents (debtors) whereby in consideration of the amount advanced by the appellant, the debtors appointed him sole agent for the sale of all the books already published by them or to be published thereafter which were to be made over to the appellant at once or immediately after publication. The appellant was to give a certain percentage on the proceeds of the books and the balance was to be paid to the credit of the joint loan account of the debtors. *Held*, that the intention was to confer a security upon the appellant who was therefore a secured creditor (1).

(b) P obtained a decree for money against E in the court of the Munsiff. He executed the decree and attached certain movable property of the judgment-debtor. Subsequently B brought a suit against E in the court of subordinate judge and obtained an order for attachment before judgment of a portion of the same property which P had attached. In B's suit an *ex-parte* decree was passed against E. B asked for action being taken under S. 63, C. P. C. After putting his decree into execution, he consented to the sale being held by the Munsiff in execution of the decree and the assets being remitted to the court of the subordinate judge for rateable distribution. This was done. E then applied to have the *ex-parte* decree set aside. The order was passed under O. 9, r. 13, C. P. C., setting it aside, which made a portion of the money realised by the sale, security for the satisfaction of the decree which might ultimately be passed. E then applied to be adjudicated an insolvent and the District Judge stopped the payment of the money for which P had applied. P and B then applied to the insolvency court for payment of their money. Their applications were rejected. It was held that B was a secured creditor, the money set apart for him as a condition precedent to the setting aside of the *ex-parte* decree being a security to him which he might draw out and appropriate to his own use (2).

(c) An unpaid vendor of immoveable property has only an equitable right under section 55 (4) (b) of the Transfer of Property Act to recover the purchase money from the property that he has sold, and does not obtain the status of a secured creditor of the vendee until his right is declared by a decree of court (3).

(d) A person who was carrying on business in the sale of goods wanted money*for that purpose and he entered into an agreement with another that the latter was to advance money for purchase of goods and, as and when the goods were sold, the realizations were to be paid to the creditor's account in his bank. The debtor became an insolvent. It was held that the agreement did not create any right of property in either the goods or the proceeds of the sale of the goods amounting to an equitable assignment such as would be binding on the trustee in bankruptcy (4).

(1) Allahabad Trading and Banking Corporation v. Ghulam Muhammad, 37 All. 383 : 29 I. C. 263 : A. I. R. 1915 All. 279.

(2) Parsotamidas v. David, 13 A. L. J. 893 : 30 I. C. 729 : A. I. R. 1915 All. 406.

(3) Mokshshagunam Subramania v. S. B. Ramkrishna, A. I. R. 1922 Mad. 385 : 70 I. C. 357.

(4) Palmer v. Carey, 95 L. J. P. C. 146 : 1926 A. C. 703.

(a) A co-operative bank has a statutory lien on the shares held by its members (1). **S. 47 (1).**

Scope—Section 28 (6) saves the right of a secured creditor and makes his remedy independent of the insolvency proceedings. If, however, the secured creditor wants to come in and participate in insolvency proceedings, he can do so on the terms laid down in the section. Thus the following courses are open to a secured creditor :—

1. He may rely on a security and not prove.
2. He may realise his security and then prove for the balance (sub-section 1).
3. He may surrender his security and prove for the whole debt (sub-section 2).
4. He may state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, if it be over property of the debtor; and in this case he will be entitled to receive dividend on the balance after deducting the assessed value of the security (2).

If he does not comply with the terms of the section, he shall, by virtue of sub-section (6), be excluded from all share in any dividend.

Sub-section (1); proving for the balance.—The secured creditor may realise his security by the exercise of a private right of sale, if it exists, or by bringing a suit. In either case, if there is a balance left still due to him after deducting the net amount realised, he may prove for that balance in insolvency. He need not obtain a personal decree under O. 34, r. 6, C. P. C., before he proves in insolvency (3). The right to prove exists even though the creditor's right to relief under O. 34, r. 6, C. P. C., is barred by limitation, provided the debt was alive and not barred by time when the order adjudging the debtor an insolvent was made (4). Even if his application for a decree under that rule is refused, it is still open to him under the special remedy provided by section 47 to prove for the balance (5). The fact that the secured creditor got his name removed from the list of scheduled creditors and proceeded to realise his security will not debar him of the statutory right to prove for the balance due to him in the insolvency proceedings (6).

In proving for the balance, the position of the secured creditor is exactly the same as that of any other ordinary creditor. The balance for which proof can be made is arrived at by reducing the proceeds of sale from the amount due for principal and interest calculated at the agreed rate upto the date of the order of adjudication, and costs. No proof can be made for interest accruing after the order of adjudication. For detailed commentary see the heading "Rule as to interest on mortgages" under section 48. The contrary proposition, *i. e.*, that interest due after date of adjudication is not to be excluded from the balance which is allowed to be

(1) Kalla Gella, *in re*, 150 I. C. 274 : A. I. R. 1933 Sind 355.

(2) Sant Prasad Singh v. Sheodat Singh, 77 I. C. 589 : 2 Patna 724 : A. I. R. 1924 Patna 259 ; Union Bank of Bijapore v. Bhim Rao Sri Nivas Rao, 119 I. C. 189 : A. I. R. 1929 Bom. 258.

(3) Babu Lal Sahu v. Krishna Prasad, 85 I. C. 543 : 4 Patna 128 : A. I. R. 1925 Patna 438.

(4) Babu Lal Sahu v. Krishna Prasad *supra*.

(5) Sharf-uz-Zaman v. Hunter, 121 I. C. 903 : A. I. R. 1930 Oudh 20.

(6) Babu Lal Sahu v. Krishna Prasad *supra*.

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2) (3), to be of doubtful validity (1).

The word 'realise' here has the same meaning as it has in section 28, sub-section (6); for that see commentary under that sub-section.

Proving for the whole debt on surrender of security.—The second course open to a secured creditor is to surrender or relinquish a security for the general benefit of the creditors, in which case he may prove for his whole debt. His position then becomes that of an unsecured creditor. The surrender of the security may be expressly done or it may be inferred from the conduct of the creditor. Both the English Act and the Presidency-towns Insolvency Act contain express provisions to the effect that if a creditor puts in a proof for his whole debt, then he is deemed to surrender his security, unless he can show that his action was due to inadvertence. The provision is to be found in Schedule 1, rule 10 of the Act of 1883, in the corresponding consolidating Bankruptcy Act of later years and rule 11, of Schedule 1, P-t. I. A. These provisions are not reproduced in the Provincial Insolvency Act but relinquishment of security will be inferred where the conduct of the insolvent is such as to lead to that conclusion. Thus where the secured creditor not only gave a proof for the whole debt but actually received a dividend on the whole debt, the correct view to take was that by his conduct the creditor must be taken to have relinquished his security, because, unless he did so, he had no right to take the step, which he did of proving, and still less had he any right whatever to receive the dividend, which he did receive (2). Similarly where certain solicitors, who had a lien for costs, handed over their security to a purchaser, they were refused leave to amend their proof (3).

The effect of a first mortgagee giving up a security is simply to put the trustee in his place, and not to accelerate the right of subsequent mortgagees (4). If the bankruptcy was subsequently annulled, the creditor should be entitled to have the security returned to him, although the debtors were adjudicated bankrupt on some other petition (5). Until a secured creditor has valued or realized his security, he has no debt provable in respect of which the trustee, having notice of the debt, is bound to make a reserve on declaring a dividend (6). There the trustee gave notice to the creditor to estimate the value of the security within fourteen days; the creditor failed to comply, and whereupon his proof, in which he mentioned but did not value his securities, was rejected, and a dividend declared and paid.

Sub-section (3); assessment of value of security.—Where the secured creditor does not either realise or relinquish his security a third course is open to him in that he may assess the value of his security in

(1) *Sharf-uz-Zaman v. H. Hunter*, 121 I. C. 903 : A. I. R. 1930 Oudh 20.

(2) *Union Bank of Bijapur v. Bhimrao Shri Nivas Rao*, A. I. R. 1929 Bom. 258 : 119 I. C. 189; *Stammers v. Elliott*, (1868) 3 Ch. 195 : 37 L. J. Ch. 353 : 16 W. R. 469 (where an executor who had proved a debt in the bankruptcy and received a dividend was held to have abandoned his right of retainer); *Padam Parshad v. Firm Mittar Sain Ganeshi Lal*, A. I. R. 1936 Lah. 690 : 164 I. C. 540.

(3) *In Re Safety Explosives, Ltd.*, (1904) 1 Ch. 226.

(4) *Cracknall v. Janson*, 6 Ch. D. 735.

(5) *Exp. Morris*, 14 L. T. 606.

(6) *Exp. Good*, 14 Ch. D. 82.

his proof and prove for the balance. It is, however, a necessary obligation on the creditor that he must assess the security. Unless he does it, his proof is liable to be rejected and he shall be excluded from all share in any dividend. It is, however, not necessary for the creditor to assess all the securities which he may have for the debt but only those which are over the property of the debtor. We proceed to consider those securities in the next paragraph.

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(3).

What securities must be valued.—The definition of the expression ‘secured creditor,’ as given in section 2, runs as follows :—

“Secured creditor means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof, as a security for a debt due to him from the debtor.” The important words to be noted in this connection in the above definition are “the property of the debtor.” The question sometimes arises as to what securities can properly be said to be securities on the property of the debtor. Securities over the property of a stranger merely do not fall within this description (1). The principle was explained by Jessel, M. R., in *Exp. West Riding Union Banking Company* (2) thus :—

“The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankruptcy estate and to retain a security which, if given up, would go to augment the estate against which he proves.”

In an administration under bankruptcy, the joint and separate estates are considered as distinct estates ; and accordingly it has been held that a bank creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That a joint creditor having security over the separate estate need not value his security in the bankruptcy of the joint estate was also held in the undermentioned English cases (3). Conversely, a separate creditor holding security over the joint estate has not to value that security in the administration of the separate estate (4). A firm in Charleston applied to a firm in Liverpool to raise funds for the purchase of cotton in America for sale in England, and the Liverpool firm asked for an advance from the bank for the purpose. The Charleston firm drew upon an American branch of the bank for the amount of the purchase money for the cotton, which was consigned to the Liverpool firm, who accepted the bills drawn upon them by the Charleston firm, and these together with the bills of lading were endorsed to the bank as security for their advance. Both firms became bankrupt. It was held that the transaction being a joint one, the bank could prove against the estate of the Liverpool firm, for the full amount of advance, without giving up that security (5). The security may be allocated to such part, if any, of the debt as is not provable (6). The shares standing in the name of the wife of an insolvent are *prima facie* her property and a lien over the property of a stranger is in no sense a lien over the property of a debtor so as to attract

(1) *Kalla Gella*, In re, 150 I. C. 274 : A. I. R. 1933 Sind 355.

(2) 19 Ch. D. 105.

(3) *Exp. Peacock*, 2 Gl. & J. 27 ; *Exp. Bowden*, 1 D. & Ch. 135. Also see *Re Plummer and Wilson*, 1 Phil. 56.

(4) *Exp. Shepherd*, 2 M. D. & D. 204 ; *Re Plummer & Wilson*, 1 Phil. 56 ; *Re Dutton, Massey & Co.*, (1924) 2 Ch. 191.

(5) *Exp. English & American Bank*, L. R. 4 Ch. 49.

(6) *Exp. Hunter*, 6 Ves. 94 ; *Exp. Glyn*, 1 M. D. & D. 25 ; *Re Fox and Jacobs*, 10 Mor. 295.

- 47 the applicability of the rules pertaining to proof of claims by secured
(5). creditors. A bank, therefore, which holds a lien on shares in the name of the insolvent's wife is not bound to value or surrender the shares (1).

Lumping of securities.—A secured creditor to whom several debts are due and who holds separate securities for them may lump together his debts and securities (2). Where, however, the debts are distinct in substance, with different securities and rights against a third party, the trustee should insist that the creditor distinguishes the different debts and securities and values them separately (3); and in all cases the trustee may require any security to be separately valued (4), but the trustee has no power to compel a mortgagee to put a separate value upon each of several parcels which form one security (5).

The lumping of securities will not, however, give the secured creditor a right which he would not have in the absence of such lumping. Thus the trustee shall not, by allowing the mortgagee to lump together different securities at an aggregate assessed value, confer on him a right of consolidation which he did not possess before the bankruptcy, so as to take away from the unsecured creditor and confer upon a secured creditor part of the bankrupt's property to which the secured creditor is not entitled (6). A creditor is entitled in making the valuation to deduct costs reasonably incurred by him in protecting or upholding the security (7).

Sub section (4) ; redemption of security.—Where a security is valued under the preceding sub-section, the court may at any time redeem it on payment to the creditor of the assessed value. Where the petitioning creditor is a secured creditor and has valued his security for the purpose of the petition, the court will not, at the hearing of the petition, inquire into its correctness, unless the estimate is plainly a sham. He will not be allowed to depart from his estimate, and it is doubtful whether he can amend his estimate of the value even in the case of a mistake (8). The right to redeem the security of a petitioning secured creditor, however, arises only if he comes in to prove.

The sub-section corresponds to schedule 2, rule 12, P-t. I. A., and schedule 2, rule 13, B. A., 1914. In those rules the trustee has been given the power to bring a security to sale under certain circumstances, and the creditor has been given the power to put the trustee to elect whether he will or will not exercise his power of redeeming the security, and in default of the trustee intimating the creditor about his intention to redeem the security, the security is foreclosed. The absence of these rules in the Provincial Insolvency Act means that the court or the secured creditors in the mofussil do not have those powers.

Subsection (5) ; amendment of valuation.—The only case in which the creditor has been given an express power to amend his estimate of the value of his security is when he realises it after such valuation. After the realisation of the security, the net amount so realised is to be substituted

(1) *Kalla Gela, in re*, 150 I. C. 274 : A. I. R. 1933 Sind 355.

(2) *Re. Smith & Logan*, 2 Mans. 70.

(3) *Re. Morris*, (1889) 1 Ch. 485.

(4) *Re Smith & Logan supra*,

(5) *Re Pearce's Trusts* (No 1), (1909) 2 Ch. 492.

(6) *Re Pearce's Trusts* (No 1) *supra*.

(7) *Exp. Carr*, 11 Ch. D. 620.

(8) *Re Vauton*, (1899) 2 Q. B. 549 ; *Re Button*, (1905) 1 K. B. 602.

for the estimate of the amount and the rights of the creditor shall be treated in all respects by reference to the valuation so amended. **S. 48.**

The present sub-section corresponds to schedule 2, rule 15, P-t. I. A., and schedule 2, rule 16, B. A., 1914. In those Acts, as we have seen, there are rules 14 and 15, B. A., 1914, and rules 13, 14, schedule II, P-t. I. A. They provide for the amendment of the valuation in other cases also and provide for the consequences of such amendment. These rules are not to be found in the Provincial Insolvency Act but they will apply, it seems, to cases under the Act (1). For amendment of valuation see the under-mentioned cases (2).

Sub-section (6).—A secured creditor, as already noted, generally remains unaffected by insolvency proceedings. He is, however, permitted to prove for his debt on the conditions laid down in section 47, sub-sections (1) to (5). If he does not comply with those conditions, the result is that he is excluded from all share in any dividend (3). In a way he is penalised for non-compliance with the provisions of the section and he is to look to his security alone for the realization of his debt. If his security is insufficient to pay his debt, and, at the same time, he does not prove in insolvency, he suffers. The provisions of this section must be strictly complied with before a secured creditor is entitled to a dividend in the insolvency proceedings (4).

Miscellaneous.—Where it has been found as a fact by the court that a secured creditor has relinquished his security for the general body of creditors and he has not appealed against it, the matter is *res judicata* and cannot be re-agitated subsequently (5).

48. (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(1) Mulla's Law of Insolvency, page 301.

(2) *Exp. Norris*, 17 Q. B. D. 728; *Re Morter*, 76 L. T. 532; *Re Fanshawe*, 1905, 1 K. B. 170; *Re Newton*, 1896, 2 Q. B. 403.

(3) *Havelishah v. Mst. Zohra Jan*, 133 I. C. 876 (2) : A. I. R. 1932 Lah. 84.

(4) *Gopi Nath v. Guru Parsad*, 15 I. C. 863.

(5) *Bank of Chettinad v. Ko Kin*, A.I.R. 1933 Rang. 393 : 14 Rang. 259 : 164 I. C. 1061.

- . 48. (2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

Scope.—This is the main section on the subject of interest ; the other relevant provisions are section 45, section 61 (6) and section 67. They will be considered at one place under the present section. For the text of these sections reference may be made to their places in the Act.

History and Analogous Law.—Section 48 is section 32 of the Act III of 1907. It corresponds to Schedule 2, Rule 23, Presidency-towns Insolvency Act. Section 48, sub-section (1) corresponds to Schedule 2, Rule 21, and section 48, sub-section (2) corresponds to section 66 of the British Act, 1914. Section 45 corresponds to Schedule 2, Rule 22, Bankruptcy Act, 1914, section 61, sub-clause 6 corresponds to section 33, sub-section (8), Bankruptcy Act, 1914 and section 67 of the present Act corresponds to section 69 of the Bankruptcy Act, 1914. In England prior to the Bankruptcy Act, 1849, interest was not provable in simple contracts unless it was expressly stipulated for. The first enactment, which allowed proof for interest where it was not stipulated for, was section 57 of the statute, 6 Geo. 4, passed in 1825. That section enabled the holder of a bill of exchange or promissory note, which was overdue at the issuing of the commission, to prove for interest, even if it was not stipulated for, at such rate as was then allowed by the Court of King's Bench. In actions upon the bills or notes it was allowed only upto the date of the commission. Then came the Bankruptcy Act, 1869, which by section 180 allowed proof for interest on all debts, though interest was not agreed upon, at a rate of 4 per cent. per annum, upto the date of the fiat or filing of the petition for adjudication. The Bankruptcy Act, 1869, also contained a provision that interest on any debt provable in bankruptcy may be allowed under the same circumstances in which interest would have been allowable by a jury, if an action had been brought for such debt. Interest accruing after adjudication was not admitted to proof, and this is still the general rule (1). Provisions corresponding to sections 61 (6) and section 67 existed in the British Act of 1883, but the provision, which we now find in section 48 (2) of our Act, was introduced into the Act of 1883 by section 23 of the Amending Act of 1890. The provisions relating to interest, as they stand now, are similar to those existing under the English law and English cases have been referred to in rulings for deciding points under the Act.

Section 48 (1) is almost the same as section 1 of the Interest Act, 1839, just as the corresponding English rule embodies the provisions of section 18 of the Statute, 3 and 4 Will, 4, c. 42. The decisions on the Interest Act, 1839, section 1, as to the meaning of the expressions in that section, apply equally to cases under the section.

(1) Mulla, page 304.

General rules as to interest payable to creditors in insolvency.—**S. 48.**

Rule 1.—A general rule in bankruptcy is that interest ceases at the date of the bankruptcy, and there shall be no proof for interest subsequent to that date (1). The principle on which the general rule rests is stated by Lord Justice James in *Re Savin* in these terms: "The theory in bankruptcy is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at that time."

Directly the insolvent files his petition and a vesting order is made, he is divested of all his properties; and he ceases to be *sui juris* for the purposes of satisfying his obligations, and the insolvency court intervenes as a court of equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. The general rule then rests on this foundation, *viz.*, that the contracts of the insolvent stopped at the date of the vesting order as a matter of legal right, and the insolvency court becomes seized of jurisdiction to deal with his property towards their satisfaction through the official assignee as a court of equity and according to equitable rules of distribution (2). The present section embodies the general rule stated above. Sub-section (1) provides for cases where interest is not reserved or agreed for in the contract between the parties; sub-section (2) provides for cases where there is a stipulation for payment of interest. The sub-section says, "Where the debt includes interest or any pecuniary consideration in lieu of interest." "The court of bankruptcy regards the substance of the transaction" (3). It makes no difference that the interest is included in a lump sum, which the bankrupt is covenanted to pay, or for which he has given bills. In *Re Holland* (4), a money-lender discounted promissory notes for £ 400 and £ 600 advancing to the borrower £ 600 cash. The £ 400 note was paid, and the borrower becoming bankrupt, the money-lender having made no appropriation, sought to prove and rank for dividend for the £ 600, but the proof was admitted to rank for £ 360 only with interest at 5 per cent. from maturity of the note to the receiving order, each note being treated as consisting of two-fifths interest and three-fifths principal, and the debtor, therefore, having out of the £ 400 note been paid back £ 240 principal. But a premium paid on a loan, though lumped with principal and interest and repayable by instalments, is not in the nature of interest and may be proved for (5). Even where a decree has been obtained in respect of a debt providing for a higher rate of interest in the contract than allowed by sub-section (2) the creditor cannot get dividends on account of interest for that higher rate (6). Under sub-section (2) interest or consideration is calculated at a rate not exceeding 6 per cent. per annum for the purposes of dividend only. It does not restrict the rights of creditors who, by their agreement with the debtor are entitled to more than 6 per cent. per annum, as to their rights in respect of the amount of proof (7). Under section 33 of the Act when an adjudication is made a schedule has

(1) *Exp. Lubbock*, 4 DeG. J. and S. 516; *Re Savin*, L. R. 7 Ch. 760; *Quartermaine's case*, 1592, 1 Ch. 639.

(2) *Subbarayalu v. Rowlandson*, 14 Mad. 133 at pages 135, 136.

(3) *Exp. Bath*, 22 Ch. D. 450; *Re Holland*, 1 Mans. 509.

(4) 1 Mans. 509.

(5) *Exp. Bath*, 27 Ch. D. 509.

(6) *Re European Central Railway Company*, 4 Ch. D. 33; *Exp. Fewings*, 25 Ch. D. 338.

(7) *Re Herbert*, 9 Morr. 253.

S. 48. to be framed showing the creditors and the amounts of the debts due to them, as proved by them. Section 34 of the Act provides that provable debts include all debts and liabilities to which the debtor is liable when he is adjudged insolvent. That would include the principal and interest at the contract rate on each debt, where the debtor is really liable to that rate in the absence of reduction by way of relief against penalty or under the Usurious Loans Act and so on. That a provable debt includes not only the principal debt but also interest upto the date of adjudication is shown both by section 34 of the Act and by the present section. This is in accordance with a long established rule in England (1). In *Kanto Mohan Mullick v. John Carapiet Galstaun* (2) a person had lent one lac on a promise to repay two. It was held, having regard to the facts, that in such a transaction the correct figure at which proof should be admitted as distinct from the correct figure upon which dividend should be paid, is the figure which would be due according to the terms of the real bargain between the parties; and that for the purposes of the dividend a different figure has to be computed, viz. the figure of one lac with interest at 4 per cent. per annum to the date of adjudication. The creditor may prove for the remaining, but in respect of the excess he would receive a dividend only after all the debts have been paid in full. He cannot, however, claim the excess even if there is a surplus, unless he has first proved; the reason is that the rule applies only to a debt which has been proved (3).

Exceptions to the rule.—The first exception to the rule stated above is provided in section 45. The effect of sections 34 and 45 is that when a debt is by contract payable at a future date, with interest in the mean time, and bankruptcy ensues before the time of payment has arrived, the creditor may prove for interest accruing after the receiving order which may be taken to correspond to the order of adjudication under the Indian Act. In such cases the proper course is to prove the principal sum as a present debt; then, under this rule, to deduct the rebate from the dividend upon it; and then to value the liability to pay interest and prove for that value, the dividend on which does not fall within this rule so as to be liable to rebate. If the rate of interest contracted for is 5 per cent. (6 per cent. under the Act) the principal sum should be proved as a present debt, and no rebate is to be deducted from the dividend (4). It may be repeated, for emphasis, that the exception is applicable to interest bearing debts only.

The second exception is provided by section 61, sub-section (6), which runs as follows:—

“Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of 6 per centum per annum on all debts entered in the schedule.”

Section 61 (5) of the Act directs distribution of the assets. After payment of certain specified preferential debts, all other debts entered in the schedule are to be paid off rateably; but that is to be done subject to the provisions of the Act. That will mean that, if a dividend is being paid, it will not necessarily be the full debt entered in the schedule which

(1) *Bromley v. Goodere*, 26 E. R. 49.

(2) A. I. R. 1930 Cal. 547 (I) : 126 I. C. 559.

(3) *Re Herbert*, (1892) 9 Morr. 253.

(4) *Re Browne and Wingrove*, (1891) 2 Q. B. 574.

is taken for the purpose of calculation but the principal with interest on it not exceeding 6 per cent. But that restriction, it must be noticed, only applies when there is a dividend to be distributed. If the assets are large enough for the whole of the proved debts entered in the schedule to be paid, then there is nothing in section 61 (5) which places any restriction on paying off the whole of those debts. And the debts entered in the schedule include the principal plus interest upto the date of adjudication according to the contract rate. The effect of section 61 (6), therefore, is that in the first instance there shall be rateable distribution of debts if the assets are insufficient and if there is a surplus it shall be utilised to pay off the debts entered in the schedule. That is to say the surplus is to be utilised in paying off the principal as well as interest at the contract rate upto the order of adjudication. Even if, after such payments, there is a surplus it shall be applied in payment of interest at the contract rate from the date of the order of adjudication till payment. This exception, apart from the express provision of section 61 (5), has been recognised in all the cases decided under the English (1) and the Indian Law (2) We next proceed to consider it as Rule 2.

Rule 2. Allowing interest after the order of adjudication at the contract rate otherwise than as provided by sections 45 and 61 (6).—

We have seen that interest upto the order of adjudication is included in the debt as entered in the schedule under section 34, but, in the case of an insufficient fund, interest at the rate of 6 per cent. per annum is allowable for the purposes of dividend, irrespective of the fact whether interest is stipulated for or not. We have also seen that if there is a surplus after payment of debts interest at 6 per cent. per annum can be awarded on scheduled debts under section 61 (6). Section 67 provides that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act and of the expenses of the proceedings thereunder. The question which arises for consideration is as to whether a creditor is entitled to interest after the order of adjudication in a case where a surplus is left after the distribution of property and payment of debts under section 61, at the contract rate. By sub-section (2) of section 48 the rule that interest shall be calculated at a rate not exceeding 6 per cent. per annum shall not prejudice the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full. Relying on the proviso to the sub-section

(1) Section 33, sub-section 8, B. A., 1914; *In re Humber Ironworks and Shipbuilding Co.*, Warrant Finance Company's case, 1877, 4 Ch. 613; 20 L. T. 859; *In re Milan Tramways Co.*, 1884, 25 Ch. D. 587; *Fryer v. Ewart*, (1902) A. C. 187; *In re W. W. Duncan & Co.*, (1905) 1 Ch. D. 307; *In re Pink*, 1927, 1 Ch. D. 287; *In re The Agricultural Wholesale Society Limited*, (1929) 2 Ch. 261.

(2) *In re Mahomed Mahmud Shah*, 18 Cal. 66; *Kanti Mohan Mullick v. John Carapiet Galstaun*, A. I. R. 1930 Cal. 547; 126 I. C. 754; (*Penumetsa*) *China Venkataraju v. Pulavarthi Lakshmanaswami*, A. I. R. 1931 Mad. 729; 134 I. C. 169; *Ghansham Das v. Public Banking and Insurance Co.*, 1920, 1 Lah. 154; 56 I. C. 251; A. I. R. 1920 Lah. 131; *Deviditta Mal v. Official Liquidator, Amritsar Bank, Ltd.*, 1920, 1 Lah. 368; 56 I. C. 69; A. I. R. 1921 Lah. 34 (6); *Esmail Esoof Moola v. Chartered Bank of India, Australia and China*, A. I. R. 1931 Rang. 334; 9 Rang. 318; 133 I. C. 238. (All these are cases under the Indian Companies Act, S. 229 of which makes the insolvency rules as to proof etc., of debts applicable to a company's liquidation proceedings.)

8. it has been held that a creditor is entitled to interest after the order of adjudication till payment out of the debtor's estate at the contract rate and that till such interest is paid the debtor is not entitled to any surplus under section 67 (1). The only obstacle possible in the way of accepting this view is created by section 67 in which the words "after payment in full of his creditors with interest as provided by this Act," occur. In the Madras ruling, where this view has been taken, these words of section 67 were considered and held not to affect the express words of section 48, sub-section (2), which expressly saves a creditor's right to a higher rate of interest. In support of this view the learned judges also relied upon the history of the law upon the subject in England. The contrary view has been taken in an Allahabad ruling (2). There it was held that ordinarily interest ceases to run automatically after the order of adjudication, that, for purposes of dividend, the rate of interest for all creditors is a uniform rate of 6 per cent. per annum, and that when all the debts entered in the schedule have been paid off, the creditors are entitled to a further amount by way of interest at 6 per cent. per annum, but after this amount also has been paid, the surplus goes to the insolvent. The same High Court in a case arising under section 35 of the Act held that under that section debts are not paid in full unless interest on the debts till the date of payment at the contract rate is paid (3). It is difficult to reconcile the two Allahabad rulings. The earlier Allahabad ruling was expressly dissented from in the Madras case.

Rule as to interest on mortgages.—Section 28 of the Act leaves unaffected the power of a secured creditor to realise or otherwise deal with his security. Section 47 provides for the conditions on which a secured creditor may come and prove in insolvency. Under section 47 three courses are open to a secured creditor. Firstly, he may realise his security outside the bankruptcy proceedings and may prove for the balance. Secondly, he may value his security and apply for his debt to be entered in the schedule; in that case he shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed. Thirdly, he may relinquish his security for the general benefit of the creditors, and he may prove for his whole debt or for a balance only; then he ranks as an unsecured creditor. And so far as the unsecured portion of his debt is concerned the provisions of the Insolvency Act do not suggest any intention of putting the secured creditor on a more favourable footing than an unsecured one. Where he sells the mortgaged property in exercise of the power of sale reserved to him under the mortgage, or gets it sold through a court, he is entitled to apply the proceeds of sale in payment of what is due to him for principal, interest at the agreed rate upto the date of realisation and costs (4). But when he seeks to prove against the other property of the insolvent, he must confine his claim, as an unsecured creditor, to the principal and interest which has accrued upto the date of adjudication, deducting therefrom the amount realized

(1) (*Penumetsa*) *China Venkataraju v. Pulavarthi Lakshmanaswami*, A. I. R. 1931 Mad. 729.

(2) *Ganga Sahai v. Mukarram Ali Khan*, A. I. R. 1926 All. 361 : 97 I. C. 556.

(3) *Muhammad Ibrahim v. Ram Chandra*, A. I. R. 1926 All. 289 : 48 All. 272 : 92 I. C. 514.

(4) *Jugal Kishore v. Bankim Chandra*, 41 All. 481 : 51 I. C. 192 : A. I. R. 1919 All. 255 (1); *V. R. Ramasubba Raju v. Seshamma*, A. I. R. 1929 Mad. 242 : 112 I. C. 621, a case of an administration suit.

by the sale of the property (1). It means that he is not entitled in that case to apply the proceeds of sale in payment of interest subsequent to the order of adjudication. And the proof will be limited to what was due for principal and interest at the contract rate at the date of the order of adjudication after deducting therefrom the proceeds of sale (2). He is, however, entitled to set off the income received from the security since the date of the order of adjudication against the interest accruing subsequent to that date (3). The law in England has now been changed by the Bankruptcy and Deeds of Arrangement Act, 1913. *Vide* section 66, sub section (2) (b) and (c), B.A., 1914. The court's right to reduce the rate of interest exists, as the court of bankruptcy acts as a court of equity as well. It can apply the provisions of the Usurious Loans Act, 1918 (4), or any other provision of law under which relief against penalty by reduction of rate is permissible (5). S. 49.

49. (1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

History.—The section is an exact reproduction of section 25 of the Act III of 1907.

Analogous law.—The rules in regard to proof of debts in ordinary cases are contained in Schedule 2, Rules 1 to 8, and Rule 25, P.-t. I. A., 1909, and Schedule 2, Rules 1 to 8, and Rule 23, B. A., 1914. The Provincial Insolvency Act is a very short Act and the rules of proof in it are not so exhaustive as they are under the Presidency-towns Insolvency and English Acts. It will be, therefore, useful to reproduce here the rules from the Presidency Towns Insolvency Act, as they are applicable in practice under the present Act as well.

Schedule 2. Rule 1. Every creditor shall lodge the proof of his debt as soon as he may be after the making of an order of adjudication. (A similar provision is to be found in section 33, P. I. A., 1920.)

Rule 2. A proof may be lodged by delivering, or sending by post in a registered letter, to the official assignee an affidavit verifying the

(1) *Re Savin*, (1872) 7 Ch. 710; *In re London, Windsor and Greenwich Hotel's Company*, 1892, 1 Ch. 639; *Ranchand v. Bank of Upper India, Ltd.*, Delhi, A. I. R. 1922 Lah. 281; 74 I. C. 187; 3 Lab. 59; *H. N. Oppenheimer v. M. E. Moola & Sons, Ltd.*, A. I. R. 1930 Rang. 20; 7 Rang. 514; 120 I. C. 902, affirmed on appeal in *H. N. Oppenheimer v. M. E. Moola & Sons, Ltd.*, A. I. R. 1930 Rang. 47.

(2) *Quartermaine's case*, 1892, 1 Ch. 639.

(3) *ibid.*

(4) *Baij Nath v. The estate of E. C. Dennet*, A. I. R. 1925 All. 400; 47 All. 745; 88 I. C. 78.

(5) *(Penumetsa) China Venkataraju v. Pulavarathi Lakshmanswami*, A. I. R. 1931 Mad. 729.

9. debt. This is the same as sub-section (1) of the present section except that the latter is to be sent to the Court under the Act and not to the official assignee.

Rule 3. The affidavit may be made by the creditor himself or by some person authorised by or on behalf of the creditor. If made by a person so authorised, it shall state his authority and means of knowledge. This is not to be found in the Provincial Insolvency Act, but the courts will recognise the affidavit of a duly authorised person, at any rate of those agents which are recognised under the Code of Civil Procedure for conducting suits and other civil proceedings.

Rule 4. It is the same as sub-section (2) of the present section, except that the official assignee takes the place of the Court.

Rule 5. The affidavit shall state whether the creditor is or is not a secured creditor.

Rule 6. A creditor shall bear the costs of proving his debt unless the court otherwise specially orders.

Rule 7. Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors at all reasonable times.

Rule 8. A creditor in lodging his proofs shall deduct from his debt all trade discount, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

Rule 25. The official assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part, or require further evidence in support of it. If he rejects a proof, he shall state in writing to the creditor the grounds of the rejection.

The rules in the English Act are almost the same and the rules under the Presidency-towns Insolvency Act are based on them.

Time for lodging proof.—See commentary under section 33 under the heading "Proof may be tendered at any time before the discharge of the insolvent."

Cost of proving debts.—Rule 6, B. A., 1914, and Rule 6, P-t. I. A., provide that a creditor shall bear the cost of proving his debt, unless the court otherwise specially orders. The same rule will apply under the Act. If a creditor appeals from the rejection of a proof, and succeeds in the appeal, he is allowed the costs, not of the proof, but of the appeal, out of the estate (1).

Proof of numerous claims.—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages of workmen and others employed by the creditor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors (2).

Admission or rejection of proof.—Under section 33 and the present section it is the court's duty to examine the proofs and admit or reject them. Under section 80 of the Act, the power of framing schedules and admitting or rejecting proofs of creditors can be delegated

(1) *Re National Wholemeal Bread & Biscuit Co.*, (1892) 2 Ch. 457.

(2) Rule 18, Calcutta High Court; Rule 21, Allahabad High Court and Rule 9, Bombay High Court.

to official receivers by the High Court, with the previous sanction of the Governor-General in Council in the case of the Calcutta High Court and with the sanction of the Local Government in the case of any other High Court. Where there has been such delegation, the admission or rejection of proofs rests with the official receiver. As to the nature of inquiry and the power to inquire into consideration for a judgment-debt, see commentary under section 33. **S. 49.**

A petitioning creditor must prove again in the usual way if he desires to vote or take a dividend. But there is no obligation on him to prove. If he lodges his proof, the court, the official receiver or the official assignee, as the case may be, has power to examine his proof and to reject it, if it or he finds that there was no debt due from the insolvent to the petitioning creditor (1). It is the duty of the official assignee to examine the proofs and to admit or reject them without undue delay (2). The main object in investing all the insolvent's property in the official assignee and requiring him to admit or reject proofs is to avoid any proceeding. The official assignee is to make up his own mind, satisfy himself as to the justness of the claim, just as any other receiver may have to do. He has to examine the proof; his duty is to put no creditor to unnecessary delay or expense. If he admits the proof, any other creditor may apply to have the proof expunged. If he rejects the proof, there is an appeal to the judge; it is at this stage and not before, that technical questions of proper evidence may arise and any creditor litigating in this manner about another creditor's proof does so at his own risk and cost. Before that stage is reached, every creditor has *prima facie* to bear the cost of proving his own debt; other creditors are entitled to inspect a proof and of course may and should give all relevant information and assistance to the official assignee (3). Notice of dividend is sufficient notice of admission (4). If the trustee neglected to give notice of the rejection of a proof, he would be taken to have admitted it (5). Rules have been made by the High Court of Bombay (R. 119) and Rangoon (R. 185) prescribing the time within which proofs must be admitted or rejected.

Withdrawal of proof.—A proof may be withdrawn before it has been dealt with by the official assignee (6) but a creditor whose proof has been rejected on the merits cannot withdraw that proof and present another in the same form. If the rejection is merely on a point of form, or if the proof had not been adjudicated upon, it may be withdrawn (7).

Production of the vouchers.—In order to satisfy itself the court may at any time call for the production of the vouchers which support the debt to be proved. It is the trustee's right and duty, when examining a proof for the purpose of admitting or rejecting it, to require some satisfactory evidence that the debt on which the proof is founded is a real debt, and for that purpose it may call for any further evidence which it may

(1) *Moor v. Anglo-Italian Bank*, (1879) 10 Ch. D. 681, 690; *Ketokey Charan v. Sree Mutty Sarat Kumari*, 37 I. C. 71; A. I. R. 1917 Cal. 39.

(2) *Re Archibald Gilchrist Peace*, A. I. R. 1921 Cal. 771; 70 I. C. 507.

(3) *In re Mogi & Co., The Yokohoma Specie Bank, Ltd., v. S. Curlender & Co.*, A. I. R. 1926 Cal. 898; 96 I. C. 459.

(4) Bankruptcy Rule 261 (English).

(5) *Exp. Kemp*, 42 L. J. Bank 26.

(6) *Re Rhoades*, (1889) 2 Q. B. 347.

(7) *Re Deenhurst*, 8 Mor. 258.

19. think necessary. It may examine the books of the creditor (1), or it may go behind a judgment-debt (2).

Other modes of proof.—Under section 78, a creditor is entitled to exclude the period from the date of the order of adjudication to the date of the order of annulment of that order in computing the ordinary period of limitation prescribed for a suit, but that concession is available only if the creditor has proved his debt under this Act. The present section provides the mode of proof. For the purposes of interpreting the proviso to section 78, it has been held that section 49 only specifies a simple mode of proof of the debt, but does not exclude any other mode of proof. Thus where the debt of the decree-holder was admitted in the insolvency proceedings by the insolvent to be due from him, it was held that the debt was sufficiently proved (3). The same was held where a decree, which the creditor sought to execute, was obtained subsequent to the insolvent's adjudication not only against the insolvent but also against the official receiver, who was impleaded as a party (4). In a subsequent Madras case, a decree was passed in favour of the plaintiff after which the judgment-debtor was adjudicated insolvent on his application, filed pending the suit. The decree contained a direction that the plaintiff should prove his debts in insolvency. The decree was assigned and the assignee applied to the insolvency court to be recognised as the insolvent's creditor and referred to the direction as to proving the debt in the decree. It was held that in the above circumstances the debt must be held to have been proved under section 78, although the formal mode prescribed by section 49 was not followed (5).

50. (1) Where the receiver thinks that a debt has been improperly entered in the schedule the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

History.—This is section 26 of the Act 3 of 1907. Under rule 73 of the Act of 1870, and the previous practice, the trustee was entitled to apply to expunge a proof which he had originally wrongly admitted.

(1) *Exp. Knight*, 2 M. & A. 545.

(2) *Re Van Laun*, (1907) 2 K. B. 23.

(3) *Krishna Chandra v. Jatindranath*, A. I. R. 1929 Cal. 159 (2): 114 I. C. 415.

(4) *Ramalinga Ayyar v. Rayalu Ayyar*, 53 Mad. 243; 122 I. C. 341: A. I. R. 1930 Mad. 356.

(5) *Ramalinga Ayyar v. Subba Ayyar*, 145 I. C. 764: A. I. R. 1933 Madras 168.

Analogous Law.—Schedule 2, rules 26 and 27, P-t. I. A and rules 24 and 26, B. A., 1914, run as follows :— **S. 50.**

Rule 26. If the official assignee (trustee in the English Act) thinks that the proof has been improperly admitted, the Court may, on the application of the official assignee, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

Rule 27. The Court may also expunge or reduce a proof upon the application of a creditor if the official assignee (trustee in the English Act), declines to interfere in the matter or, in the case of a composition or a scheme upon the application of the insolvent.

Scope ; exercise of powers under the section.—Under section 33 it is usually the court which frames the schedule, but the power of framing schedules and admitting or rejecting proofs can be delegated to the official receiver. The powers under the present section can, however, be exercised by the court alone and nobody else. They cannot be delegated to anybody else, including the official receiver or a subordinate judge. An official receiver has no power to expunge or reduce a debt entered in the schedule of an insolvent (1). The official receiver, once he has entered a debt in the schedule, cannot expunge the debt, acting under section 50 of the Act. Under section 80, powers of the court for review, which the court has, cannot be delegated to the receiver nor has the receiver any inherent jurisdiction to review his own orders (2).

The section contemplates a judicial inquiry by the court itself for the rectification of the schedule, when framed. Where the court itself frames the schedule in the first instance, the operation is intended, at least in general, to be an *ex parte* determination by the court upon the evidence furnished by the alleged creditors. It or the official receiver, where the power has been delegated to him, does not, in framing the schedule, decide judicially or finally upon contested claims (3). The inquiry is to be conducted by the court itself. The public examination of the insolvent under S. 14, P. I. A., 1907, (S. 24, P. I. A., 1920) (4) nor evidence taken by an ordinary receiver to whom the district judge may delegate the taking of evidence is relevant under the section (5).

Who can apply.—The proper person who should ordinarily move the insolvency court to expunge or reduce a proof is the receiver. The mere fact that the official receiver has himself admitted the proof and entered the debt in the schedule does not preclude him from applying under the section (6). If the receiver declines to interfere, or if no receiver has been appointed, the application may be made by a creditor (7). If the application, however, although made in a creditor's name, is really made on behalf of and for the benefit of the debtor, it will be dismissed (8). Where the application is

(1) *Muthuswami Chettiar v. Official Receiver, North Arcot*, 97 I. C. 407 : A. I. R. 1926 Mad. 1019.

(2) *Ahmad Haji Doosad Moosa v. Mackenzie Stuart & Co.*, 105 I. C. 366 : A. I. R. 1928 Sind 40.

(3) *S. K. Mohideen Kadirshaw Maraikar v. Official Receiver, Tinnevely*, A. I. R. 1918 Mad. 906 : 41 Mad. 30 : 45 I. C. 67.

(4) *In re Brunner*, (1887) 19 Q. B. D. 572 ; *S. Hanumanthu v. Receiver of the estate of Subbayyar*, 61 I. C. 767 : A. I. R. 1921 Madras 28.

(5) *S. Hanumanthu v. Receiver of the estate of Subbayar supra*.

(6) *S. K. Mohideen Kadirshaw v. the Official Receiver, Tinnevely supra*.

(7) *Exp. Merriman*, 25 Ch. D. 144, decided under the Act of 1869.

(8) *Re Tallerman*, 5 Mor. 119 ; *Re Dashwood*, (1886) 3 Mor. 257.

50. made by any creditor to have an amendment made of the schedule, as framed by the court under section 33, he must of course cause notice to issue to all the other creditors, who would thereby be affected and their objections be heard, but the receiver is not a proper party, as the case is one of a dispute among the creditors on the one side and a third person on the other. In an application or appeal in connection with this, the receiver is not a necessary party (1). So long as insolvency exists, a debtor cannot apply for expunging or reducing a debt. As a general rule a debtor cannot question the validity of a debt. In this connection reference may be made to the amendment which the present Act made in its section 33, by deleting the provision for issuing notice to the insolvent, which existed in the Act 3 of 1907. By the section, however, the debtor can make an application in the case of a composition or scheme. The word "composition" or "scheme" means a composition or scheme accepted by the creditors (2). The section in making provision for the debtor applying to expunge a proof embodies the decision in the English case of *Exp. Bacon* (3), where it was held that the fact that the proof had been on the file of proceedings for more than a year did not estop the bankrupt from making the application, the file in bankruptcy not being in the nature of a record. In exceptional circumstances, the court may however entertain an application by the debtor under the section even after his proposal for a composition or scheme has been rejected. Thus the court expunged the proof of certain creditors by reason of whose votes a proposal for a composition was rejected, it being shown that the debts claimed by them were not provable in bankruptcy (4).

When to apply.—The receiver is entitled at any time afterwards to apply to expunge a proof which he had originally wrongly admitted, and mere lapse of time is no objection to the application. But if the proof is expunged or reduced, the creditor is entitled to retain any dividend already paid (5), but he is not entitled to a dividend on his reduced proof until the amount of dividend overpaid to him has been brought into account and wiped out (6). In a Madras case the facts were somewhat unusual. The official assignee had admitted the proof of claim of a creditor of the insolvent and had transferred insolvent's property to him by means of a registered sale deed. After the sale the official assignee applied to the insolvency court for expunging the proof of the creditor. It was held that the only remedy of the official assignee was to have the sale deed set aside by means of a regular suit, and that it was not open to the official assignee to come to the insolvency court and to have the proof expunged (7).

Appeal.—Where an inquiry has been held under section 50, anybody prejudiced by the expunging or reducing of a debt can appeal as of right (8).

(1) *Maung Po Yiek v. Power*, 150 I. C. 960 : A. I. R. 1934 Rang. 112.

(2) *Re Benoist*, 1909, 2 K. B. 784; *In re Bond*, 17 Ch. D. 447; *Ganga Sahai v. Mukarram Ali Khan*, A. I. R. 1926 All. 361 : 97 I. C. 556.

(3) 17 Ch. D. 447.

(4) *Exp. Bluck*, (1887) 4 Mor. 273.

(5) *Exp. Harper*, 21 Ch. D. 537.

(6) *Re Searle, Hoare & Co.*, (1924) 2 Ch. 325.

(7) *Official Assignee of Madras v. V. K. Natesa Chetty*, A. I. R. 1929 Mad. 141 : 114 I. C. 840.

(8) *Ganga Sahai v. Mukarram Ali Khan*, 97 I. C. 556 : A. I. R. 1926 All. 361.

Miscellaneous.—A business was carried on by three partners and the partnership was dissolved. A large sum of money was held to be due to one of the partners out of the partnership assets. After the partnership suit had been instituted two of the partners were adjudicated insolvent, and by an arrangement between the solvent partner and the official assignee of the estate of the two insolvent partners, the assets of the partnership were realized and one-third thereof was handed over to the representatives of the deceased insolvent partner who meanwhile had died. The representatives thereafter tendered a proof in insolvency for a debt due to the deceased partner. Other creditors of the partnership claimed that as the debt was due to a member of the partnership and he was liable as a partner to liquidate the debts of the partnership proof of the debts due to the deceased partner by his representatives should be expunged. The plea was accepted and the proof expunged (1). In *Pearey Lal v. Allahabad Bank* (2) the facts were very unusual. In execution of his decree one A attached a certain property belonging to the judgment debtor, B, but before the attachment one C had obtained a sale deed in his favour in respect of the property attached. B was adjudicated insolvent and C, as transferee, got his name entered in the schedule of creditors. The question for decision was as to whether C's title is good or whether the transfer in C's favour was fictitious. The point was decided by the executing court. In revision to the High Court it was pleaded, on the authority of section 50, that the matter should have been decided by the insolvency court. The plea was overruled and it was held that there is nothing in section 50, which says that any question of title raised between two scheduled creditors will be decided by the insolvency court and that the question, coming within the purview of O. 21. R. 58, C. P. C., was rightfully decided by the executing court and was not therefore open to revision.

S. 51.

Effect of insolvency on antecedent transactions

51. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

History.—This is section 34 of the Act 3 of 1907, except that the words “the date of the admission of the petition” in sub-section (1) have been substituted in place of the words “date of the order of adjudication.” The amendment effected two purposes. Under S. 34, P. I. A., 1907, the

(1) A. K. R. M. N. C. T. Chettyar Firm v. S. P. Dayabhoy & Sons A. I. R. 1935 Rangoon 59 : 12 Rang. 669 : 156 I. C. 336.

(2) A. I. R. 1926 All. 244.

S. 51. dividing line was the date of the order of adjudication, but there was no provision that the assets must have been realised before the execution creditor had notice of the presentation of the petition. The result was that a creditor who had obtained a decree against a debtor was entitled to proceed with the execution of the decree and to have the debtor's property sold even after the presentation of an insolvency petition by or against him and even after he had notice of such presentation, and if the sale proceeds were realized before the making of the order of adjudication, he was entitled to receive the entire sale proceeds. This was rather unjust and contrary to the policy of the insolvency laws, whose object is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active (1). This obvious injustice also led to a conflict of decisions under the old Act. By section 28 clause (7) (which corresponds to section 16 clause (7) of the Act 3 of 1907), the receiver's title relates back to the date of the presentation of the petition. That provision was so construed as to read the expression "the date of order of adjudication" in S. 34, P. I. A., 1907, as meaning the date of presentation of the petition. Thus it was held by the Calcutta High Court that an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the purpose of making the property of the insolvent liable to the claims of the creditors and that assets realised by an execution creditor after the presentation of the petition, though before the order of adjudication, vested in the official assignee and could not be applied in satisfaction of the decree under execution (2). The contrary view to the effect that clause 1 of S. 34, P. I. A., 1907, was not controlled by S. 16, P. I. A., 1907, was taken by the Patna (3), Allahabad (4) and an earlier case of the Calcutta High Court (5). Other cases noted in the commentary will go to show that the date of the order of adjudication was taken to be the material date in most cases for determining the respective rights of the execution creditors and the receiver as representing the general body of creditors. In cases decided under the old Act and where other points arising under the section were raised and decided, the date of the order of adjudication is mentioned. In order to make them applicable under the present Act, the date of the admission of the petition should be understood in place of the date of the order of adjudication. At first it was proposed to bring the old section into line with S. 53, P. I. A., 1909, but the proposal, having evoked considerable criticism particularly with reference to the difficulties of proving whether a creditor had notice of the proceedings or not, was amended by the Select Committee and the result is the present section (6).

Analogous Law.—S. 53, Pt. I. A., 1909, sub-section (1) runs as follows :—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the official assignee, except in respect of assets realised in the course of

(1) *Bower v. Hett*, (1895) 2 Q. B. 51 : 73 L. T. 176.

(2) *Rakhal Chandra v. Sudhindra Nath Bose*, 46 Cal. 991 : 52 I. C. 747.

(3) *Pali Ram v. Sheo Nath Prasad*, 39 I. C. 246 : A. I. R. 1917 Patna 678.

(4) *Sri Chand v. Murari Lal*, 34 All. 628 ; 16 I. C. 183 ; *Basarmal v. Khem Chand*, 11 I. C. 433 ; *Din Dayal v. Gur Saran Lal*, 42 All. 336 : A. I. R. 1920 All. 253.

(5) *Madhu Sardar v. Kbitish Chandra Banerji*, 42 Cal. 289 : 30 I. C. 82.

(6) Report of the Select Committee, dated 24-9-19.

the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor." **S. 51.**

Section 53, sub-sections (2) and (3) are the same as sub-sections (2) and (3) of the present section. Under the Presidency-towns Insolvency Act, the execution creditor, to prove his right to the proceeds of execution, must prove that they were realised before adjudication and that he had no notice of the presentation of the insolvency petition.

Section 40, B. A., 1914, runs as follows :—

(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale ; an attachment of a debt is completed by receipt of a debt ; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

The corresponding sections of the B. A., 1883, were sections 45 and 46. The difference between the English and the Indian Law is obvious. The English Law as to the rights of execution creditors is different from the Indian law. In the English law, the material date is the date of the receiving order and the creditor is also to prove that he had no notice not only of the presentation of any bankruptcy petition by or against the debtor but also of the commission of any available act of bankruptcy by the debtor. Again, there in England, the creditor, in order to retain the benefit of the execution, must have completed the execution or attachment before the date of the receiving order. And under section 41, sub-section (2), even if the proceeds of the sale or money paid to avoid sale reaches the sheriff, he retains it for fourteen days, and if within that period notice is served on him of a bankruptcy petition having been presented by or against the debtor, the proceeds of execution shall go to the official receiver. In other respects too the English law of execution is very technical. The Indian Insolvency Acts are based generally on the English law and English decisions have been referred to and relied upon for considering the Indian Acts. The present section, however, depends upon the Indian law of execution which is different from that in England and, therefore, the English decisions as to the rights of execution creditors should not be indiscriminately referred to for cases arising for decision under the Indian Acts.

The words " assets realised in the course of the execution by sale or otherwise," which occur in the present section, were also to be found in section 295 of the Code of Civil Procedure, 1882. S. 295, C. P. C., 1882, has now been substituted by S 73, C. P. C., 1908, with many important alterations in the wording. The words " where assets are held by a court," have been substituted for the words " whenever assets are realised by sale

- i. 51** or otherwise in execution of a decree"; and the words "before the receipt
(1). of such assets," have been substituted for the words "prior to the realization." The interpretation of the expressions occurring in the old section 295 of the Code of Civil Procedure, 1882, have been relied upon for interpreting similar expressions in the present section of the Provincial Insolvency Act. There was a considerable conflict of opinion on the interpretation of the words "assets realised in the course of the execution by sale or otherwise," under the old Code. That conflict is in evidence in decisions under this section of the present Act and the decisions are by no means uniform or reconcilable. An attempt shall be made to note cases decided under S. 295, C. P. C., 1882, and S. 73, C. P. C., 1908, which have a bearing upon the section under consideration.

Object.—The policy and the object of the section are to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active (1). The amendments of the law of procedure in this country as well as the law of bankruptcy in England, have been based upon the principle that, so far as possible, the creditors shall be treated *pari passu*, and that nothing short of actual realization of the debt due should give rights of priority (2). The principle that one creditor shall not take part of the fund which would otherwise have been available for payment to all the creditors and at the same time be allowed to come in *pari passu* with other creditors for satisfaction of his debt out of the remainder of that fund does not apply when that creditor obtained by his diligence something which did not and could not form part of that fund (3). The section is intended to put a premium upon the diligence and promptness of careful creditors, without, at the same time, violating the principle of equal distribution in insolvency.

Sub-section (1) ; scope.—In order that the sub-section may apply, it is necessary that the following conditions should be proved to have existed, by the person who claims the benefit of the execution ;—

(a) a decree should be under execution and some process should have been issued against the property of the debtor ;

(b) there should be assets realised in the course of the execution by sale or otherwise ; and

(c) the assets should have been realised before the date of admission of the petition.

Property of a debtor.—The property against which execution has issued and the assets which have been realised by such execution should belong to the debtor. Thus where money is paid by a third person to avoid attachment or sale and not paid on behalf of the judgment-debtor, the money does not pass to the trustee in bankruptcy (4). The money must, however, be that of the third person *in fact* so that where an execution creditor was induced to come to an arrangement by the untrue representation of the debtor that the goods seized were the property of his wife, and in pursuance of the arrangement the goods were sold, it was held that the trustee was entitled to recover the proceeds of the sale from the creditor

(1) Bower v. Hett, (1895) 2 Q. B. 51 : 73 L. T. 176.

(2) Krishna Swami v. Official Assignee of Mad, (1903) 26 Mad. 678.

(3) Cockerell v. Dickens, 2 M. L. A. 353.

(4) Bower v. Hett, (1895) 2 Q. B. 51.

and was not estopped by the debtor's misrepresentation from establishing, as the fact was, that the goods were the debtor's property throughout (1). Again, the debtor against whose property execution has issued and the debtor who is the subject of the petition should be the same person. Where, therefore, a judgment was obtained and execution issued against a firm and an individual partner had a receiving order made against him, it was held that the trustee had no title to the proceeds of sale against the execution creditors (2). It may, however, happen that, before the execution is completed, something takes place which makes the property cease to be the property of all the partners and vests an interest in the trustee of one of them. In that case the court will, in the interest of the joint creditors, restrain the execution creditor from going on with his execution, and will take upon itself to order an account to be taken of the joint estate, distribute the proceeds among the joint creditors rateably, and hand over the surplus, if any, to the solvent partner, this interference with the rights of the latter being justified by the facts that an execution has been set in and that the solvent partner by allowing that to be done has abandoned his rights of administering the joint estate (3).

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(1).

Benefit of the execution.—The word "benefit" has been interpreted to mean that it is the net realization in execution after paying the costs. It would be justifiable to award it to the creditor who has incurred the expenses of bringing the property to sale (4). Under section 52 if, before the sale takes place, notice is given to the executing court about the admission of the insolvency petition, the attached property has to be handed over to the official receiver. At the same time it is provided that the costs of the suit, in which the decree was made, and of the execution shall be a first charge on the property so delivered. It is difficult to understand why a similar right to the execution creditor was not granted by express words under section 51. A sale may take place after the date of the admission of the petition, but the execution creditor has all the same to take steps to attach the property and complete other preliminaries before the property can be actually brought to sale. All that procedure involves expense and there is no reason why he should be deprived of his expenses, properly incurred, by reason only of the fact that the judgment-debtor goes to the insolvency court. It is gratifying to note that in the only decided case so far reported, the rights of the execution creditor under section 51 have received a favourable consideration in this respect. It is doubtful whether the courts will be prepared on general equitable considerations, in the absence of any express words, to hold that the costs of the execution and the costs of the suit in which the decree under execution was passed shall have a prior claim over the attached property in preference to the general right of creditors.

Assets.—The word "assets" is a very wide term. It includes all the property of the debtor which can be made available for the payment of his debts. It means a man's all property, of whatever kind, which may be used to satisfy debts or demands existing against him (5). Thus money

(1) *Re Evans*, (1916) F. B. R. 111.

(2) *Dibb v. Brooke & Sons*, (1894) 2 Q. B. 338.

(3) *Dibb v. Brooke & Sons*, *supra*; *Barker v. Goodaire*, 11 Ves. 78, 85; *Dutton v. Morrison*, 17 Ves. 193.

(4) *Swaminatha Ayyar v. Official Receiver*, South Malabar, 57 Mad. 330; 145 I. C. 999; A. I. R. 1933 Mad. 703.

(5) *Sorabji v. Govind*, (1891) 16 Bom. 91.

§. 51 brought voluntarily into court is an asset (1).

(1).

Realised in the course of execution by sale or otherwise.—The word "realise" has given rise to much difficulty in actual practice. The question which arises for determination in each case is the exact time when the asset can be said to have been realised. Generally speaking, an asset is said to be realised when it is immediately available for distribution to the creditors, though in fact it has not been actually distributed. As soon as the particular asset is by some process reduced into possession, reduced, that is to say, to a form in which it is available for immediate application towards the satisfaction of the decree which is being executed it can with perfect accuracy be described as realised (2). The realization of the asset depends upon the character of the asset and it is a question which can be determined according to the circumstances of each case as to when a particular asset can be said to be immediately available for distribution or delivery to the creditor. We proceed to consider the decided cases, classifying them according to the nature of the property attached and the nature of the process used for the purposes of realising that asset.

Mere attachment per se does not amount to realization.—The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitled to be classed with the other creditors, all of whom are entitled to rateable distribution of the assets in the hands of the receiver. Such creditor has no higher title than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him. The leading authority on this proposition is the Full Bench case of the Calcutta High Court reported in (1902) 29 Cal. 428 (3). The question referred to the Full Bench was as to whether a vesting order made under the Insolvency Act (11 and 12 Victoria, c. 21), had or had not the effect of giving the official assignee priority over the claim of the judgment-creditor in respect of property attached at the latter's instance previous to the passing of such order. The question was answered in favour of the official assignee. Even previous to that ruling, it was held by the Calcutta High Court in *Soobal Chundra Law v. Russik Lall Mitter* (4) that attachment creates no charge upon the property, and by the Judicial Committee of the Privy Council in *Moti Lal v. Karraab ul-Din* (5) that attachment only prevents alienation and that it does not confer any title. Since then the above proposition has been laid down in numerous cases (6).

(1) *Hari Charan v. Parindar Nath*, 70 I. C. 541 : A. I. R. 1921 Cal. 749. (Under S. 73, C. P. C.)

(2) *Sorabji v. Govind*, 16 Bom. 91.

(3) *Fredrick Peacock v. Madangopal*, 29 Cal. 428.

(4) I. L. R. 15 Cal. 202.

(5) (1897) 25 Cal. 179.

(6) *Krishna Swamy Mudaliar v. Official Assignee of Madras*, (1903) 26 Mad. 673 ; *Jit Mal v. Ram Chand*, 29 Bom. 405 ; *Haran Chandra v. Jai Chand*, A. I. R. 1929 Cal. 524 : 123 I. C. 737 : 57 Cal. 122 ; *Damodar Das v. Official Receiver*, 117 I. C. 145 : A. I. R. 1930 Sind 127 ; *Lang v. Jaswant Lal*, 94 I. C. 146 : 50 Bom. 439 : A. I. R. 1926 Bom. 271 ; *Re Prem Lal Dhar*, 43 I. C. 348 : 44 Cal. 1016 : A. I. R. 1918 Cal. 351 ; *Bansi Lal v. Kanshi Nath*, 145 I. C. 695 : A. I. R. 1933 Nag. 229 ; *Ram Rao v. Wasu Deo*, 110 I. C. 893 : A. I. R. 1928 Nag. 336 ; *Trimbuk v. Sheo Ram*, 65 I. C. 941 : A. I. R. 1922 Nag. 108 ; *Kashi Nath v. Kanhaiya Lal*, 37 All. 452 : 29 I. C. 990 : A. I. R. 1915 All. 305 ; *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, 60 I. A. 167 : 56 Mad. 405 (P. C.) : A. I. R. 1933 P. C. 134.

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(1).

Under S. 64, C. P. C., a private transfer of an attached property does not affect the rights enforceable under the attachment. But the section prevents private alienation only. A British Indian adjudication order cannot be affected by the prohibitory provisions of section 64 of the Code, as it is not a private transfer. Such an order operates *vi s'tatuti* (by operation of law). Another reason why an attachment alone does not amount to the realization of the property attached may be based upon the observations of Lord Justice Lush in *Ex parte Pillers, In re Curtoys* (1), which will bear quotation. He says: "By virtue of the adjudication of bankruptcy and the relation back of the trustee's title, all the property which the bankrupt had at the time when he committed the act of bankruptcy is vested in the trustee and becomes divisible among the creditors. The debt had, therefore, ceased to be due to the bankrupt and had become due to the trustee. Then this clause was inserted for the protection of a creditor who, after the commission of an act of bankruptcy of which he had no notice, a secret act of bankruptcy, had pursued his remedy, but it protects him only upon certain conditions. Goods seized under a *Fi. Fa.*, goods in the ordinary popular sense of the word, must not only have been seized, but sold, before the adjudication. The intention was that so long as the execution remained only a security for the debt, it was not to be protected. Something more must have been done; there must have been an actual conversion of the security into money." The effect of an attachment is to make the attached property, in a sense, a security for the decree in which it is attached, in so far as it takes away the debtor's power of disposal over it. But it remains a security and there is nothing more to convert the security into money; and to make it available for distribution or handing over to the execution creditor something more must be done. It is a very useful test as to when an asset can be said to be realized. So long as the attached property remains only a security for the debt, it is clearly not realized. As to when the security is converted into money is a question of fact which depends upon many factors.

Realization of tangible property, movable and immovable.—

We have seen that mere attachment does not confer any right, charge or lien over the property in favour of the attaching creditor. Something more must have been done beyond the state of mere attaching, which would convert the security into money available for distribution. In the case of property of the description under consideration the next step after attachment is the sale of the property. After the sale the auction-purchaser deposits the purchase money in the court, the court makes an order for payment and the last step is for the execution creditor to take that amount from the court. It has been held that where the sale has taken place and the sale proceeds have been deposited in court before the order of adjudication under the old Act (the date of the admission of the petition under the present Act), the execution creditor is entitled to apply the sale proceeds exclusively in satisfaction of his debt (2). Where, however, only twenty-five per cent. of the amount of the sale money was deposited before the order of adjudication and the balance was deposited after the order of

(1) (1991) 17 Ch. D. 653.

(2) *Sri Nivasa v. Official Receiver, South Kanara*, 75 I. C. 172; A. I. R. 1925 Mad. 224; *Basarmal v. Khem Chand*, 11 I. C. 433; *Shivaldas v. Lal Chand*, 146 I. C. 961; A. I. R. 1933 Sind 305.

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adjudication it was held that the sale proceeds were not realised before the date of the order of adjudication. The words "before the date of the admission of the petition" qualify the words "assets realised". They do not qualify the word "sale" and the assets can be said to be realized in execution only on the date on which the balance of purchase money is deposited. They cannot be said to be realized in execution on the date when the deposit of 25 per cent of the sale proceeds is made. He is not entitled even to the 25 per cent. deposited before the material date (1). It has also been held by the High Court of Madras that where immovable property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be realized until the entire amount of the purchase money in respect of all the parcels is paid in court (2). This decision was followed by the Calcutta High Court (3). But in a later case that court held that where immovable property is sold in separate parcels, the sale proceeds are deemed to be realized on the several dates on which they are received by the court (4). As regards movables the Lahore High Court has held that if the property consists exclusively of movables and they are sold in separate lots on different dates, the sale proceeds are deemed to be realized on several dates of their receipt by the officer of the court and not on the date on which the last payment is received. Again, it has been held by the Calcutta High Court that the court is competent to employ an agent for the conduct of the sale in execution under O. 21, r. 65, C. P. C., and that the receipt of purchase money by an agent so appointed to conduct the sale is equivalent to receipt of assets by the court within the meaning of S. 73, C. P. C. In that case there was a consent decree which provided that the defendant would sell his movables through an auctioneer and satisfy the plaintiff's claim, but the defendant-judgment-debtor, being afterwards unwilling to proceed with the sale, the court, on the application of the plaintiff decree-holder for execution, issued an order upon the auctioneer to sell the property covered by the decree who thereupon sold it and received the purchase money (5). In order to make the assets realised, all that is necessary is that the sale proceeds should have been deposited in court before the material date. It is not necessary that the sale should have been confirmed also before that date. According to Civil Procedure Code an auction purchaser's title dates from the date of sale if confirmed by the court. Until confirmation, however, he has an inchoate right which can be recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the official assignee takes the estate only subject to the rights of third persons affected by the same and cannot claim to have the sale cancelled on the ground of any equity possessed

(1) *Hafeez Mahomed Ali Khan v. Dimodar Pramanick*, (1891) 18 Cal. 242; *Rama Nathan Chettiar v. Subramanian Chettiar*, 83 I. C. 216 : 48 Mad. 656 : A. I. R. 1925 Mad. 248.

(2) *Rama Nathan v. Subramanian*, 1903, 26 Mad. 179.

(3) *Barendra Nath v. Martin & Co.*, 62 I. C. 167 : A. I. R. 1921 Cal. 801.

(4) *Grindarnath v. Kedarnath*, 87 I. C. 783 : A. I. R. 1925 Cal. 966.

(5) *Galstaun v. Umesh Chandra Bunerjee*, A. I. R. 1917 Cal. 740 : (1917) 44 Cal. 789 : 35 I. C. 850.

by the general body of creditors at the time of adjudication (1). It is not necessary that the assets should have been ordered to be paid to the judgment-creditor (2) or that the amount should have been actually paid (3). **S. 51 (1).**

When a decree-holder is given leave to bid and set off at a court sale, there is a receipt of assets when the sale takes place (4). Where the sale is held by the Collector, the assets are realized as soon as the sale proceeds are received by him, though he may send the sale proceeds to the court under Schedule 3, clause 9, C. P. C., at a later date (5). Rents of property under attachment which have been realised by a receiver appointed at the instance of one decree-holder are assets realised by sale or otherwise in execution of a decree (6).

Money deposited in Court.—It has been held in England that where in an action on a bill of exchange money is deposited in court by the defendant to abide the event, and the matter is submitted to arbitration, and before the award, the defendant becomes bankrupt and an award is subsequently made in favour of the plaintiff, the plaintiff is to be treated as a secured creditor in respect of the deposit (7). It has similarly been held that where money is paid into court admitting liability, the plaintiff, in the event of the defendant's bankruptcy, is a secured creditor in respect of it, and when liability is denied, he is a secured creditor for so much of his claim in the action as may be admitted for proof in bankruptcy (8). The same principle has been held to apply to money paid into court as a condition of leave to defend under the Rules of the Supreme Court, 1883, O. 14, and such money will be ordered to remain in court until the event is determined either by trial of action or admission of a proof (9). In the Civil Procedure Code there are several provisions under which the court may order the defendant to deposit money in court or where the defendant himself, apart from any order from the court, may deposit an amount in court. We shall consider some of the provisions under which amounts are generally deposited or ordered to be deposited.

(i) Where a suit is brought on the basis of a negotiable instrument under order 37 r. 2, C.P.C., the court can grant leave to appear and defend suit subject to terms as to payment into court or giving security, etc.

(1) *The Official Assignee of Madras v. Ponnu Swami Mudali*, 26 I. C. 421 : A. I. R. 1915 Mad. 400 ; *Vishva Nath v. Vir Chand*, (1882) 6 Bom. 16 ; *Achambit Lal v. Chhangamal*, 32 I. C. 429 : A. I. R. 1916 Oudh 274.

(2) *Firm of Tek Chand v. Official Assignee*, 134 I. C. 1178 : A. I. R. 1931 Sind 164.

(3) *Badri Das v. Sheonath Singh*, A. I. R. 1915 All. 62 : 28 I. C. 816 ; *Mahomed Shariff v. Radha Mohan*, 41 All. 274 : A. I. R. 1919 All. 68 : 57 I. C. 760 (actual payment had been made).

(4) *Ganga Ram v. Mukti Ram*, 11 Pat. 250 : 134 I. C. 616 : A. I. R. 1931 Pat. 405 ; *Navaj v. Tota Ram*, 133 I. C. 37 : A. I. R. 1931 Bom. 252 ; *Shrinivas v. Radhabhai*, (1882) 6 Bom. 570.

(5) *Dattatraya v. Pundliyo*, 58 I. C. 992 : A. I. R. 1920 Bom. 35.

(6) *Fink v. Maharaja Bahadur*, 26 Cal. 772.

(7) *Ex parte Banner*, (1874) L. R. 9 Ch. App. 379. See also *Ex parte Bouchard*, (1879) 12 Ch. D. 26.

(8) *Re Gordon*, (1897) 2 Q. B. 516.

(9) *Re Ford*, (1900) 2 K. B. 211.

- S. 51.** It is submitted that the English case, *Re Ford* referred to above, will be followed in India (1).

(ii) O. 9, r. 13, C. P. C.—Where an *ex parte* decree is passed against a person, that person may apply to the court for setting it aside and the court may make an order to that effect upon such terms as to costs, payment of the decretal amount into court or otherwise as it thinks fit. In an Indian case, the facts were as follows :—P obtained a decree against E, in the court of the Munsiff. He executed the decree and attached certain movable property of his judgment-debtor. Subsequently B brought a suit against E, in the court of the Subordinate Judge and obtained an order for attachment before judgment of a portion of the same property which P had attached. In B's suit an *ex parte* decree was passed against E. B asked for action being taken under S. 73, C P. C., after putting his decree into execution. He consented to the sale being held by the Munsiff in execution of the decree and the assets being remitted to the court of the Subordinate Judge for rateable distribution. This was done. E, then, applied to have the *ex parte* decree set aside. The order was passed under O. 9, r. 13, C. P. C, setting it aside which made a portion of the money realized by the sale, security for the satisfaction of the decree which might ultimately be passed. E, then applied to be adjudicated an insolvent and the District Judge stopped the payment of money for which P had applied. P & B then applied to the insolvency court for payment of their money. Their applications were rejected. It was held that P was entitled to rateable distribution, the sale in execution of his decree being neither illegal nor invalid ; and that B was a secured creditor within the meanings of Ss. 31 and 34, P. I. A., 1907, the money set apart for him as a condition precedent to the setting aside of the *ex parte* decree being a security to him, which he might draw out and appropriate to his own use (2).

(iii) O. 24, C. P. C.—Under O. 24, r. 1, C. P. C., it is open to the defendant to deposit the amount of the suit in court or such sum of money as he considers a satisfaction in full of the claim in the suit. The money may be paid into court or by common consent it may be deposited with a third person. Where money is deposited in court under the said order or where it is deposited with another person by common agreement, and the defendant is subsequently adjudged insolvent, the question may arise as to whom the money should go, the plaintiff or the receiver. In such cases, it has been held that the plaintiff is entitled to be paid out of this sum in preference to the other creditors (3).

(iv) O. 41, r. 6, C. P. C. Where the defendant appellant obtained an order for stay of execution of a decree passed against him on depositing the decretal amount in court, pending the appeal, and subsequently the appellant was adjudicated insolvent and the official assignee did not choose to proceed with the appeal, which was, therefore, dismissed,

(1) *Upalaiyar v. Thiruvengadan Pillai*, A. I. R. 1918 Mad. 1158 : 38 I. C. 481, where the English cases in *Re Ford*, 2 Q. B. 211 and *Bird v. Barstow*, (1892) 1 Q. B. were followed.

(2) *Parsotami Das v. David*, 30 I. C. 779 : A. I. R. 1915 All. 406.

(3) *Gourang Behari Basak v. Manindra Nath Das*, A. I. R. 1933 Cal. 625 : 145 I. C. 826 : 37 C. W. N. 475.

it was held that the money deposited into the court was payable to the de cree-holder and not to the official assignee (1).

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(v) *O. 38, C. P. C.* Under rule 1 of the said order the court may issue a warrant of arrest against the defendant and to bring the defendant before the court to show cause why he should not furnish security for his appearance. The defendant can avoid arrest by paying the amount claimed in the suit to the officer entrusted with the execution of the warrant. Under rule 2, the court can order the defendant to deposit in court money or his property sufficient to answer the claim against him or to furnish security for his appearance. When money is paid into court by the defendant under order 38, rule 2, sufficient to answer the plaintiff's claim, it is earmarked for the suit and is subject to the lien of the plaintiff in the event of his success. The plaintiff is entitled to appropriate the amount towards his decree to the exclusion of the official receiver and the creditors of the defendant. Where the security for his appearance is furnished, such security will be merely conditional for his appearance in the court and cannot be said to be to the credit of the suit. In the second case so long as the condition is not broken the money is that of the defendant and will pass to the receiver in insolvency (2).

Under rule 5, order 38, the court may direct the defendant to furnish security to produce at the disposal of the court some property of his or, where his property has been already attached, the court may remove the attachment on the defendant's furnishing the required security under rule 9. Where the plaintiff took out summons for attachment before judgment of certain property belonging to the defendant who deposited a certain sum of money into court as security in order to prevent the attachment, the defendant subsequently became insolvent, and, then, the plaintiff claimed to withdraw the money, it was held that, as the money was merely paid as security for the production of the property and to render attachment unnecessary, the plaintiff did not acquire a charge on it and could not claim it in preference to the official assignee (3). The learned judges followed the English case in *Re Pollard, Ex parte Pollard* (3), and, after having made the observation that the sequestration under which the money was brought into court in that case corresponds to attachment under our law, proceeded to quote with approval the following remarks of Romer, L. J., :—"In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property. To my mind these propositions are now free from doubt. Therefore, in an ordinary case like the present, the facts that the sequestrators had sequestered money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had any special charge thereon." Similarly where the property of the defendant which, being attached before judgment, was released on his payment of a cash security and the defendant was subsequently declared insolvent under

(1) *Chowth Mal v. Calcutta Wheat and Seed Association*, 51 Cal. 1010 : 84 I. C. 922 : A. I. R. 1925 Cal. 416 ; *Subramania Chettiar v. Raja Rajeswara Sethupathi*, A. I. R. 1918 Mad. 442 : 41 Mad. 327 : 43 I. C. 187.

(2) *Ramiah v. Gopaliar*, A. I. R. 1919 Mad. 607 : (1918) 41 Mad. 1053 : 49 I. C. 20.

(3) *Errikulappa Chetty v. Official assignee of Madras*, A. I. R. 1917 Mad. 743 (2) : 39 Mad. 903 : 32 I. C. 190.

(4) (1903) 2 K. B. 41 : 72 L. J. K. B. 509.

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Act 3 of 1907, it was held that the plaintiff acquired no lien or charge on the money deposited as security for getting the attachment before judgment withdrawn and the receiver in insolvency of the defendant's property was entitled to have the money paid to him (1).

Order 21, Rules 46, 52 & 53.—Rule 46 prescribes the procedure for attaching a debt due to the debtor or share in other property, which is not in possession of the judgment-debtor, or any property deposited in the custody of any court. Where the property to be attached is in the custody of any court or public officer attachment is to be made according to rule 52. For attachment of decrees in favour of the judgment-debtor by the attaching decree-holder, we have to look to rule 53. As already noted, mere attachment of property does not confer any right or title on the attaching creditor so as to prevent the vesting of the property in the receiver. The case of tangible property, whether movable or immovable, is an easy one and it is always possible to determine with certainty as to when the assets are realised. In the case of debts, decrees and moneys deposited in the custody of the court or any other public officer, the question is not so easy of determination. Still the test should be the same, and we again quote from Lord Justice Lush in *Ex parte Pillers, in re Curtoys* (2). The relevant remarks are :—

"Something more must have been done; there must have been an active conversion of the security into money, and, I think, we must find some equivalent for that in the case of attachment under a garnishee order. What is the equivalent? The security must have been realised before there can be any protection. How can the garnisher realise the debt which he has attached? The debt cannot be sold, and he can only realise it by obtaining payment of it from the garnishee, either voluntarily or by means of execution on his goods; till that has been done I think there is no protection. It is true the words "executed by seizure and sale" have no application to the case. But I think they do show what was the meaning of the Legislature clearly enough to enable us to apply the principle, and if, for want of apt words in the section, we were to say, it does not apply to a garnishee order, we should be incurring the censure which is implied in the *maxim qui haeret in litera haeret in cartice*. I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is an actual receipt of the attached debt by the garnisher. Till that has been done, the attachment is only a security and is not protected by section 95."

Following the above decision it was held by the Bombay High Court that where N, on an attachment under a garnishee order, handed over rupees twelve hundred, a sum largely exceeding the amount due by him to the judgment-debtor, together with Rs. 83-9-0, the costs of the execution, to the sheriff, and on the following day the judgment-debtor filed his petition in the insolvent court, the official assignee's title must prevail. The reasons for the decision were given in the following words : "The payment to the sheriff could not be treated as equivalent to a payment to the creditor. It was really tantamount to a payment in the court. The fact that a larger sum was paid to the sheriff than was actually owing, showed that such payment was paid for the purpose of

(1) *Promatha Nath v. Mohini Mohan*, A. I. R. 1916 Cal. 531 : 31 f. C. 573.

(2) (1881) 17 Ch. D. 653.

getting rid of the attachment and not in satisfaction of the debt. The property in the hands of the sheriff must still be considered as belonging to the insolvent, and, therefore, as being vested in the official assignee (1). **S.51 (1).**

There can be no doubt about the proposition that money attached in the execution of a decree in the hands of a third person cannot be said to be realised in any case unless they reach the court which passed the decree. Where, therefore, a treasury officer retained the money for transmission to the court but it did not actually reach the court, it was held that there was no realization. The principle laid down by Lord Justice Lush has not been followed in India in all cases. After the money has been deposited in court by the garnishee, the next two steps are generally an order of payment by the court to the decree-holder and the actual payment of the amount to him. According to the English decision cited above, nothing short of actual payment to the decree-holder will save the money from going to the official receiver. Except for the Bombay case referred to above, there is no decided Indian case, which has gone to the length of holding that an actual payment to the decree-holder is necessary. In an earlier Bombay case the facts were as follows :—

"On the 8th July, 1890, the plaintiff Warden sued (Suit No. 382 of 1890) Govind Ram Ji for Rs. 2,237, and on the eighteenth *idem* obtained an attachment before judgment of certain money belonging to Govind Ram Ji in the hands of the B. B. and C. I. Railway Company. On the 5th August, 1890, Warden got a decree in the suit for Rs. 2,008, with interest and costs, and on the 13th August, 1890, applied for execution. On the 24th September, 1890, Govind Ram made an assignment in favour of his attorneys, Messrs. Wadia and Ghandy of the fund belonging to him, (expressed to be Rs. 7,818) in the hands of the Railway Company, subject to the attachment levied on the same by Warden. This assignment was intended to secure costs incurred by Messrs Wadia and Ghandy as attorneys for the defendant. Notice for this assignment was at once given to the Railway Company. In February, 1891, the Bank of Bengal attached the sum of Rs. 7,818, in the hands of the Railway Company, in execution of a decree, obtained by the bank against Govind Ram Ji in Suit No. 190 of 1890, and subsequently other creditors of Govind Ram Ji, who had obtained judgments against him, applied for execution and obtained attachment of the sum in question. On the 25th May, 1891, under a consent order in suit No. 282 of 1890, the Railway Coy., paid over to the Sheriff of Bombay, the sum of Rs. 8,084-1-0, which was the amount admitted by the company to be due to Govind Ram Ji after making all just reductions. It was contended by Messrs. Wadia and Ghandy that, under the above assignment of the 24th September, 1890, they were entitled to the fund assigned to them, subject only to the claim of Warden, who had, at the date of assignment, already attached the said fund, and that subsequently attaching creditors had no claim to the said fund.

It was held that the fund in question must be regarded as "assets realised by sale, or otherwise in execution of a decree," within the meaning of section 295 of the Civil Procedure Code (XIV of 1882) (2).

(1) *Jitmand Ramanand v. Ramchand Nand Ram*, 29 Bom. 405.

(2) *Sohrab Ji v. Govind*, (1891) 16 Bom. 91.

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Mere payment into court by the garnishee, of the sum attached was held amounting to realization in a Calcutta case. There the sum had not been ordered to be paid to the decree holder (1). This case was followed by the Sind court (2). In an Oudh case, it was held that where steps are taken by the court for the purpose of obtaining a sum of money into its own possession under a perfectly legal application for execution, which the decree-holder is in law entitled to make, it does not matter that instead of issuing a precept under section 46, or a garnishee order under O 21, C. P. C., the court issued a process under rule 4 of the same order (3). Where the garnishee sent the amount to the executing court by cheque and it was received by it, it was held by the same High Court that, even though there was no order of payment in favour of the decree-holder and the money had not in fact been paid to the decree-holder, the assets were realised within the meaning of the present section (4). In a Patna case the money was not even deposited in the court. There a certain sum in the hands of the District Board due to the insolvent judgment-debtor was attached by an execution creditor and a payment order had been granted by the executing court in favour of the creditor, directing the District Board to pay over the money to him. It was held that the assets were realised on the date the precept was issued to the District Board. It was not necessary to decide the point; all the same the judges expressed their definite opinion to the above effect (5).

The same principle which applies to a garnishee order under O. 21, rule 46, will apply where the property is attached in the hands of any court other than the executing court or a public officer under rule 52. The difficulty, however, arises where the court in whose custody the money to be attached is and the court issuing execution happen to be the same court. The law in Madras was finally settled by a full bench decision (6). The law was laid down in the following words:—

“The fact that money was lying in Court to the credit of the judgment-debtor in a suit other than in which the attachment was made does not make the assets held by a Court, within the meaning of section 73, which clearly refers to assets levied in execution or paid into court in satisfaction of the decree under execution and not to assets lying in the same court to the credit of the judgment-debtor in another suit. When the attaching Court and the custody Court are the same, an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into court to the suit in which the attachment took place. It is only when this is

(1) *Madhu Sardar v. Khitish Chandra Banerjee*, A. I. R. 1915 Cal. 734 : 42 Cal. 289 : 30 I. C. 82.

(2) *Firm of Tek Chand v. Official Assignee*, 134 I. C. 1178 : A. I. R. 1931 Sind 164.

(3) *Official Assignee, Bombay v. Durga Prasad*, A. I. R. 1934 Oudh 11 : 6 Luck 278 : 147 I. C. 68.

(4) *Official Assignee, Bombay v. Durga Prasad* *supra*.

(5) *Ram Sundar Rai v. Ram Dhevan Ram*, A. I. R. 1918 Patna 214 : 46 I. C. 224.

(6) *E. N. Visvanadhan Chetti v. Arunachalan Chetti*, A. I. R. 1921 Mad. 218 : 44 Mad. 100 : 60 I. C. 302.

done that the court, as attaching court, can properly be said to have received the assets and to hold them within the meaning of section 73." **S. 51 (1).**

The main reason adduced in support of the above proposition by Wallis, C. J., was that for the purposes of O. 21, r. 52 the custody court and the attaching court, though in fact they may be the same, should be treated as different and that, just as it is necessary for the attaching court to issue an order calling in the money when the money is in the hands of a public officer or another court, it is also necessary for it to issue an order transferring the amount standing in another suit pending in that court to the credit of another suit or decree in which the attachment is issued. The Full Bench case was again considered and followed in a subsequent Madras Full Bench case (1). The extreme view expressed by Justice Oldfield to the effect that the fund attached under O. 21, r. 52 required no further realization in *Uma Venkataratnam v. Methewal & Adamji Usman* (2) must now be considered to have been overruled (3). It may be noted that the three Madras cases referred to above were decided under S 73, C. P. C. The principle of those decisions will, however, apply to cases arising under the section. The above Madras view was expressly dissented from by the Sind High Court (4).

To sum up, we may lay down that actual payment to the decree-holder in cases where the property is attached under O. 21, rr. 46 and 52 has not been held necessary to hold the assets as realised, except in one Bombay case (5); secondly, depositing the amount in court by the garnishee or an order of transfer by credit in case where the money is in the hands of the attaching court itself in another proceeding is sufficient for saying that the property is realised; thirdly, that even if the money is not deposited in court by the garnishee but the court has issued a precept to the garnishee to pay the amount over to the execution creditor, the money becomes exclusively that of the decree-holder and the money will be considered to be realised on the date of the issue of precept. The general test, it is submitted, which should be followed, having regard to the circumstances of the case, should be what was laid down by that eminent judge, the learned Chief Justice, Sir L. H. Jenkins, in 28 Bom. 264 (6) that the word "realised" means converting into cash or into a form whereby it becomes available for immediate distribution. Judged by this test an asset will be realised as soon as it is available for payment to the decree-holder. That will be the case when the money is in court to the credit of the decree-holder and not in court merely in general account. Thus two conditions are necessary: firstly, that the money should be held by the court and secondly, it should have been earmarked for the decree in which it is to be paid. The effect of earmarking may be made by an express order or it may be implied from the proceedings.

(1) Nachiappa Chettiar v. Subbiar, A. I. R. 1923 Mad. 505 : 46 Mad. 506 : 72 I. C. 820.

(2) A. I. B. 1919 Mad. 66 : 42 Mad. 692 : 50 I. C. 925.

(3) See the observations of Schwabe, C. J., in A. I. R. 1923 Mad. 505 on page 507.

(4) Firm of Tek Chand v. Official Assignee, A. I. R. 1931 Sind 164 : 134 I. C. 1178.

(5) 29 Bom. 405.

(6) Mani Lal Umedram v. Manabhai Maneklal, 28 Bom. 264.

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Where the property consists of a decree due to the judgment-debtor, its mere attachment is not enough. The attaching decree-holder will have to execute the attached decree and any sum realised in the attached decree shall be governed by the same principles which will apply as if the attaching decree-holder were the decree-holder in the attached decree.

Before the date of the admission of the petition.—As already noted, under the Act 3 of 1907, the material date taken for the purposes of dividing the benefits of execution between the decree-holder and the receiver was the date of the order of adjudication. Under the present Act it is the date of the admission of the petition which is to be taken as the dividing line (1). Section 18 provides that in regard to the admission of insolvency petitions the procedure in regard to the admission of plaints shall be followed. The date of the admission is to be distinguished from the date of the presentation of the petition. They may be different dates. Where, therefore, moneys are brought into court between the date of the presentation of a petition for insolvency and the date of its admission, the money shall go to the creditor (2). Petition means the petition on which the order of adjudication is made. Where, therefore, the first petition for insolvency is dismissed on any ground and a fresh petition is presented, on which the judgment debtor is adjudicated insolvent, the proceeding on the second application cannot be considered to be proceedings in continuation of the first application, and if the assets were realised before the date of the admission of the second application, though after the date of the admission of the first application, they will go to the decree-holder in satisfaction of his decree (3).

Having regard to section 18 a petition is admitted when it is entered in the register. Or it may be taken to be the date on which the court makes an interlocutory order, as the appointment of an interim receiver (4) or an order for furnishing security (5). It is not necessary that the date of hearing must be fixed at the time of admitting the petition and it is wrong to say that, unless a date of hearing is fixed, the petition is not admitted (6).

Again, it may be observed that the judgment-debtor should have been adjudged insolvent before the section can apply. If the petition is finally dismissed the section will not apply. In a Lahore case, a particular decree was assigned to another, and after assignment the assignor decree-holder was adjudged insolvent. On the assignee decree-holder's applying for execution and realizing certain assets of the debtor, the district judge, on the application of the assignor's estate's receiver, ordered that the assets should be paid to the latter. The order was set aside by the High Court because section

(1) *Muthan Chettiar v. Venkituswami Naicker*, A. I. R. 1936 Mad. 819 : 59 Mad. 928.

(2) *Dayaram Mengh Raj v. Sakhi Bai*, 130 I. C. 559 : A. I. R. 1931 Sind 65.

(3) *Maung Maung v. A. R. R. M. A. N. Chettyar Firm*, A. I. R. 1930 : Rang. 265 : 126 I. C. 65 ; *D. N. Chatterjee & Co. v. Rajkumar Mandal*, 146 I. C. 597 (2) : A. I. R. 1933 Cal. 651.

(4) *Ramanathan Chettiar v. Subramaniam Chettiar*, A. I. R. 1928 Mad. 248 ; 85 I. C. 216 : 43 Mad. 656.

(5) *Agar Chand v. Prithvi Singh*, A. I. R. 1936 Lah. 885.

(6) See (5) above.

tion 51 had no application (1). Where a person attached before judgment the property of a joint Hindu family (including the sons' share) and the same was sold in execution of the decree against the father alone, sons not taking any objection and the father having been adjudicated insolvent before the sale, it was held that the price of the sons' share would go in satisfaction of the decree and the price of the father's share only vested in the official receiver for the benefit of the general creditors (2). It is clear that where during the pendency of the execution proceedings the judgment-debtor has been declared insolvent, the decree-holder can only claim such amount as has been realised in execution before the date of the admission of the insolvency petition (3). If the executing court has distributed the assets to the creditor, which should have been paid over to the official receiver, it has been held that the insolvency judge has, under section 4 of the Act, full power to decide whether the official receiver was entitled to the assets realised by the decree-holder in execution of his decree against the insolvent and to order for the refund of the money paid to the decree-holder (4).

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(2) (3)

Sub-section (2) ; secured creditors.—The present sub-section is in accordance with the general scheme and policy of the insolvency laws. By section 28 sub-section (5), the order of adjudication does not affect the rights of secured creditors. As to whether on the insolvency of the judgment-debtor the official receiver is a necessary party to the suit or execution proceedings of the secured creditor, see commentary under section 28, sub-section (6).

Sub-section (3) ; purchaser in good faith under an execution sale.—The sub-section saves the rights of a third person who acts in a *bona fide* manner. If the sale takes place before the date of the admission of the petition, the auction purchaser gets a valid title. If the sale takes place after the date of the admission and before the order of adjudication and there is no question of the applicability of the section 52 *infra*, the question may arise as to whether the property itself or the sale proceeds thereof vests in the receiver. If it is the property itself which vests in the receiver, it is the auction purchaser who is affected and the auction purchaser's remedy in such a case would be only to claim the sale price from the decree-holder under the relevant provisions of the Civil Procedure Code or by a regular suit. If it is the sale proceeds which vest in the receiver, then the decree-holder is affected and the auction purchaser gets a valid title (5). In this connection attention may be drawn to the doctrine of the relation back of the trustee's title to the date of the presentation of the petition on the making of an order of adjudication. Under section 28 all the property of the insolvent which existed on the date of the presentation of the petition vests in the receiver and an auction purchaser

(1) *Bashesharnath v. Bagamal*, 120 I. C. 175 : A. I. R. 1929 Lah. 805. (It was not worth reporting).

(2) *Official Receiver v. Arunachalam*, A. I. R. 1934 Mad. 217 : 149 I. C. 127.

(3) *Dunichand v. Jitmal*, A. I. R. 1934 Lah. 535 ; *Tejmal Marwari v. Jokiram Surajmal*, A. I. R. 1936 Pat. 112 : 160 I. C. 146.

(4) *Sardar Mohammed v. Labburam*, 14 Lah. 724 : 144 I. C. 580 : A. I. R. 1933 Lah. 477, 'dissenting from an earlier single bench ruling of the same High Court reported in *Din Mohammed v. Tara Chand*, 116 I. C. 192 : A. I. R. 1930 Lah. 39.

(5) See *Rangappa Gangappa v. Ghanshyam Madhao Tapi*, A. I. R. 1937 Nag. 193, where the distinction appeared directly.

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in the case of a sale which takes place after the presentation of the insolvency petition will get no title to the property on the simple ground that the judgment-debtor had on that date no title, right or interest in the property sold. The sub-section is intended to save the rights of such auction purchasers provided they are proved to have acted in good faith. The question directly arose in an Allahabad single bench case (1). There the sale took place between the date of the presentation of the petition and the date of the order of adjudication. No reference, it appears, was made to the doctrine of relation back of the trustee's title in the arguments. The learned judge relied upon an earlier division bench ruling of the same High Court reported in *Din Dayal v Gur Saran Lal* (2), and held that, when an auction sale has taken place, the property itself no longer vests in the court or the receiver, but under section 51 the sale proceeds are at the receiver's disposal. The judgment relied upon was under the old Act 3 of 1907, and in section 34 of that Act (corresponding to the present section), the date of the order of adjudication was the material date. Under that section neither the property sold nor the sale proceeds thereof vested in the receiver if the sale took place before the date of order of adjudication. Section 34 was a sort of exception to the general rule stated in S. 16, P. I. A., 1907 (corresponding to section 28) that the receiver's title relates back to the date of the presentation of the insolvency petition. All that the Division Bench decided was that section 16 must be read subject to S. 34, P. I. A., 1907. Under the present section sales which take place between the date of the admission of the petition and the order of adjudication are not safe. It is true that sub-section (1) of the present section does, not expressly provide that a sale held after the date of the admission of the petition will be void against the receiver. But that proposition is clearly implied therein. And sub-section (3) is a clear proof of that implication. It is submitted that, unless the case of the auction purchaser of a sale held after the date of the admission of the petition and before the date of the order of adjudication comes under sub-section (3), he does not acquire a good title to the property which vests in the receiver (3). As regards a sale which takes place between the date of the presentation of the petition of insolvency and the date of the admission of the petition, it is submitted that the principle laid down by the Division Bench in *Din Dayal v. Gursaran Lal*, will apply in that it will not be the property itself but the sale proceeds which will vest in the receiver. And the ground of the opinion will be that such a sale is impliedly saved by the present section from the general effect of the relation back of the trustee's title to the date of the presentation of the petition (4). It is therefore submitted that, in the Single Bench ruling of the Allahabad High Court, the proposition has been laid down rather too broadly and it needs qualification in the light of the foregoing observations.

Sale taking place after the order of adjudication.—The point for consideration is: Does the present sub-section protect the title of a purchaser in good faith at an execution sale which takes place after the order of adjudication? On the passing of an order of adjudication the

(1) *Kishansarup v. Mukandi Lal*, A. I. R. 1934 All. 252 : 148 I. C. 891.

(2) A. I. R. 1920 All. 253 : 59 I. C. 67 : 42 All. 336.

(3) *Jagendra Nath Kundu v. Jagneswar Mandal*, A. I. R. 1935 Cal. 612 : 158 I. C. 574.

(4) See *Muthan Chettiar v. Venkituswami*, A. I. R. 1936 Mad. 819, *per* Cornish, J., at p. 824, cl. 2 : 59 Mad. 928.

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(3).

insolvent ceases to have any title or interest in his property which vests in the official receiver. And for all practical purposes it is the receiver who will represent the insolvent in all claims and proceedings against the insolvent's estate. There is a devolution of interest by operation of law and O. 22, r. 10, C. P. C., applies. It is provided by rule 10 that the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. And this rule, on the analogy of general principles, shall apply to execution proceedings of a decree or order. Rule 10 is not mentioned in rule 12 which expressly provides that the rules 3, 4 and 8 of Order 22 shall not apply to execution proceedings; and, by a sort of reverse or negative reasoning, it may be concluded that rule 10 applies to execution proceedings. The other relevant provision which may be considered in this connection is order 21, rule 22, which provides that where an application for execution is made against the legal representatives of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for. The distinction between the scope of order 22, rule 10 and order 21, rule 22 is that the former applies to pending proceedings, whereas the latter applies to execution proceedings started or commenced after the interest of the original judgment-debtor has devolved on the legal representative. Order 21, rule 22, was however applied to the case of a pending execution proceeding by their Lordships of the Privy Council in a case arising under the Indian Insolvency Act, 1848 (1). In that case the property of the judgment-debtor was attached in execution of a decree against him. Afterwards the judgment-debtor was adjudged insolvent under the Indian Insolvency Act, 1848, and his property vested in the official assignee. No notice under order 21, rule 22, of the Code of Civil Procedure, 1908, was served on the official assignee. The property was then sold in execution of the decree and it was held by the Privy Council that the sale was void as against the official assignee and that the auction purchaser acquired no title to the property. It was also held that a notice under order 21, rule 22, of the Code was a condition precedent to the validity of the subsequent execution proceedings, and that, no such notice having been issued and served upon the official assignee, the sale was a nullity. In the course of the judgment their Lordships said, "Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place, the property having passed to the official assignee it was wrong to allow the sale to proceed at all. The judgment-creditors have no charge on the land and the court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the official assignee before the court and obtain an order binding on him (under order 21, rule 22), and accordingly he was not bound by anything which was done. In the third place, the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser and consequently the respondents acquired no title to the property."

(1) *Raghunathdas v. Sundardas*, (1914) 41 I. App. 251 : A. I. R. 1914 P. C. 129 : 42 Cal. 72 : 24 I. C. 304. (In cases under the Insolvency Chapter (Chapter XX) of the Code of Civil Procedure, 1888, the property of the insolvent vested in a receiver. Under that chapter it was held that a sale of the property of the insolvent after the property had vested in the receiver was void and that the purchaser acquired no title to the property. *Ghouri Datt v. Shankar Lal*, (1892) 14 All. 358 and *Vira Raghava v. Parasurama*, (1909) 15 M. J. 272)

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(3).

From the above quotation it will appear that their Lordships of the Privy Council based their finding on more than one ground. Their Lordships were not called upon and could not be called upon to consider the effect of a section like the present section 51, in relation to a vesting order. Supposing that the official receiver is brought on record in execution proceedings after the order of adjudication, but he neglects to take any interest in it, and at the same time, the sale which takes place is proved to have taken place in favour of a purchaser acting *mala fide*, the reasoning based on order 21, rule 22, will not apply, nor the reasoning based on the ground that the judgment debtor had no title to the property on the date of the sale will apply. The question arises: Will sub-section (3) come up for the consideration of the court in deciding the validity of the sale in a case like the one supposed above? The imaginary case stated above is given to bring it out clearly that the Privy Council case does not cover in all its various aspects the point which we are here considering (1). Nevertheless the Privy Council ruling has been relied upon for holding the view that a sale held after the order of adjudication is null and void and that no question of good faith arises in a case of such a sale (2). In all these cases it was expressly decided that no question of good faith arises where the sale takes place after the order of adjudication, though the question of good faith of the purchaser was also considered. The contrary view that section 51, sub-section (3) protects a purchaser in good faith at a sale held after an order of adjudication has been taken by the Calcutta High Court (3) and assumed to be correct in a Madras case (4). In the Calcutta case, A. I. R. 1935 Calcutta 503, the Privy Council case reported as *Raghunathdas v. Sundardas* (5) was distinguished and the law was laid down in very explicit terms as follows:—

“A purchaser of an insolvent's property at a sale in execution of a decree, even with notice of the insolvency, who purchases the property in good faith acquires a good title to it, against the receiver in whom the insolvent's property had vested under section 28, sub-section (2). The provision contained in sub section (2) is controlled by the latter provision contained in section 51, sub-section (3). It effectually secures the title of a purchaser of an insolvent's property at a sale in execution in case of good faith being established on the part of the purchaser and the receiver in insolvency cannot be allowed to have the sale declared null and void, so as to defeat the title of the purchaser.”

(1) *Mukti Ram v. Ganga Ram*, 146 I. C. 252: A. I. R. 1933 Pat. 619: 13 Pat. 30. See in this connection *Jokhi Ram Surajmal Firm v. Chouthmal Bhagirath*, A. I. R. 1931 Pat. 70: 9 Pat. 945: 130 I. C. 38, in which the contrary appears to have been held *V. G. Anantharama Iyer v. Kovilamma*, 34 I. C. 829: A. I. R. 1917 Mad. 924; *Chunilal v. Vithal*, A. I. R. 1933 Nag. 28: 140 I. C. 835.

(2) See *Muthan Chettiar v. Venkituswami*, A. I. R. 1935 Mad. 819: 59 Mad. 928, *per Venkatasubba Rao, J.*, on p. 823.

(3) *Madhusudhanpal v. Parbati Sundara Dasya*, 35 I. C. 643: A. I. R. 1917 Cal. 606, (case decided under Act 3 of 1907); *Dinesh Chandar Roy v. Choudhuri C. Jahanali*, A. I. R. 1935 Cal. 503: 62 Cal. 457: 157 I. C. 862.

(4) *Ramanatha Mudaliar v. Vijayaraghavalu*, A. I. R. 1927 Mad. 983: 103 I. C. 34.

(5) *Raghunath Das v. Sundar Das*, 42 Cal. 72: 24 I. C. 304: 41 I. A. 252: A. I. R. 1914 I. C. 129.

The learned judges relied upon an earlier ruling of the same High Court reported in *Madhusudanpal v. Parbati Sundari Dasya* (1). It is submitted that the earlier ruling did not decide that a purchaser with notice of insolvency proceedings can be a purchaser in good faith. In that case, the execution purchaser had transferred the property to another person who had notice of the insolvency proceedings, but the purchaser himself had no notice of them.

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(3).

Good faith.—It has been held that a purchaser cannot be said to have acted in good faith if he had knowledge of the insolvency proceedings. The essence of good faith is that the purchaser should not know of the defect in his vendor's title ; if he does, then he loses his protection. The principle contained in sub-section (3) for the protection of purchasers in good faith is only a particular application of the general principle which runs through many branches of the law (2).

Receiver's right to apply for setting aside sale.—Under section 51, there may be cases where the executing court holds a sale which is not binding on the receiver. A receiver occupies a twofold position. He is the representative of the insolvent as well as the general body of the creditors. Any general statement to the effect that the receiver is or is not a representative of the judgment-debtor, for the purposes of section 47, Civil Procedure Code, is necessarily misleading. It all depends upon the purpose and nature of the application made by the receiver (3). When a receiver in insolvency comes to the execution court with the objection that the property attached cannot be sold for the judgment-debtor's debt, it having been vested in himself for the benefit of the creditors, he is not for that purpose a representative of the judgment-debtor. Acting in such a case under the usual provisions of the Civil Procedure Code, he is merely a third party making a claim. An application, therefore, by a receiver in insolvency under Order 21, rule 90 to set aside a sale being an application by a person interested under Order 21, rule 90, no second appeal lies from the order passed thereon (4). An application by a receiver of an insolvent's estate to set aside a sale on the ground of a prior adjudication of the debtor is an application under section 47, and a second appeal can lie in the High Court from an order passed on appeal. Proceedings to set aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge or satisfaction of a decree and hence fall under both section 47 and O. 21 r. 90, C. P. C. Proceedings to set aside auction sales on any other tenable ground also involve questions relating to execution, etc., and hence fall under section 47, Civil Procedure Code, though they may not fall under O. 21, r. 90, C. P. C. It is an executing court which is entitled to set aside a sale on an application under section 47, and no separate suit will lie. It is only where Order 21, rule 90 also applies (besides section 47) to a petition to set aside an auction sale that no second appeal lies under

(1) A. I. R. 1917 Cal. 606 : 35 I. C. 643.

(2) *Chuni Lal v. Vithal*, A. I. R. 1933 Nag. 28 : 140 I. C. 835 ; *Muktirama v. Gangaram*, A. I. R. 1933 Pat. 619 : 146 I. C. 252 : 13 Pat 30 ; *Anantharama Iyer v. Kovilamma*, A. I. R. 1917 Mad. 924 : 34 I. C. 829.

(3) *Mohitosh Dutt v. Rai Satishchandra*, A. I. R. 1932 Cal. 203 : 136 I. C. 593.

(4) *Mohitosh Dutt v. Rai Satish Chandra*, A. I. R. 1932 Cal. 203 : 136 I. C. 593. See also *Kashi Prasad v. Miller*, (1885) 7 All. 752.

- S. 51** section 100. But where section 47, Civil Procedure Code, alone is
(3). applicable to the petition, the order passed thereon is a decree and a second appeal lies (1).

A prior decision in execution proceedings to which the defendant was a party to the effect that the suit property was liable to be attached in execution of a decree against him, does not bind the official assignee appointed in consequence of the defendant's insolvency, as the official assignee cannot be deemed to be the legal representative of the insolvent defendant within the meaning of section 11, Civil Procedure Code, nor can it be said that he is litigating under the same title. The official receiver in the second suit wanted the property for the benefit of the defendant's creditors (2).

Where the official assignee applied to the executing court under the section praying that the sale proceeds be made over to him for distribution amongst the creditors it was held that, the official assignee not being the representative of an insolvent judgment-debtor, no appeal would lie against the disallowance of his claim to have the proceeds of the sale in execution of a decree against an insolvent judgment-debtor paid over to him (3).

Where the *mustajari* of the debtor's land was completed before the admission of the petition, it was held valid. It was further held that the debtor could not apply to have it set aside, but it was the receiver alone who had that right (4). An application was made by a person for insolvency and before the application was admitted one creditor attached a part of the insolvent's property in execution of his decree. The property was subsequently sold and purchased by the decree-holder creditor. The purchaser applied to the insolvency court for amendment of the petition in insolvency by excluding from the lists of the assets the property purchased by him. The amendment was allowed. The receiver was not appointed till after the sale. Another creditor appealed against the order allowing amendment. It was held that a creditor not being a receiver had no *locus standi* to maintain an application under section 51 (5).

Miscellaneous.—Where the *ad interim* receiver appointed after admission of the insolvency application but before adjudication applied to a court executing a decree against a petitioner in the insolvency court to stay a sale of immovable property and the trial court refused to stay the sale but on appeal the District Judge did so, it was held that the judgment-debtor, in the absence of the receiver, had no right to appeal, and the order was set aside (6). But where the application under Order 21, Rule 90 put in by the judgment-debtor was dismissed and the judgment-debtor was adjudged an insolvent on an application filed by a creditor subsequent to the sale, the judgment-debtor, though adjudged insolvent, was held to have a right to prefer an appeal against the order of dismissal of application under Order 21, rule 90. The ground of the

(1) Anantharama Iyer v. Kovilamma, A. I. R. 1917 Mad. 924.

(2) The Official Assignee of Madras v. Aiyu Dikshithar, A. I. R. 1925 Mad. 688 : 88 I. C. 85.

(3) Grey, Official Assignee v. Hazari Lal, (1908) 30 All. 486.

(4) Lal Chand v. Vir Singh, A. I. R. 1937 Lah. 634.

(5) Sheikh Mohammad Yasin v. Sheikh Fateh Mohammad, A. I. R. 1937 Patna 643.

(6) Aziz-ud-Din v. Niamat Ali, 129 I. C. 213 : A. I. R. 1930 Lah. 970.

decision was that the property did not vest in the official receiver until the sale was set aside, that the judgment-debtor was a person whose interests were affected by the sale, and that he could not only file an application under Order 21, rule 90 but also he could prefer an appeal from an order passed on such an application (1). Property which had already vested in the official receiver was put to sale by the decree-holder without notice to the official receiver and was purchased by him. The irregularity was brought to the notice of the execution court by the judgment-debtor, but the sale was confirmed and the delivery of possession was also duly carried out. On a report from the receiver the insolvency court annulled the sale and delivery of possession. It was held that the insolvency court had power to do so (2).

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52. Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

Duties of Court
executing decree as
to property taken in
execution.

History.—Section 35 of the Act III of 1907, ran as follows :—

“Where execution of a decree has issued against any property of a debtor which is saleable in execution, and, before the sale thereof, notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.”

The expression “that an order of adjudication has now been made against the debtor” has been substituted by the words “that an insolvency petition by or against the debtor has been admitted.” The words “the costs of the suit in which the decree was passed and” did not occur in the old section. This is an amendment in favour of the decree-holder.

The amendment substituting the date of the admission of the petition for the date of the order of adjudication for which notice is to be given to the executing court is intended to carry out the policy of the insolvency laws more correctly. Under the old section every creditor

(1) *Subbaraya Goundan v. Virapa Chettiar Bank*, A. I. R. 1933 Mad. 851 F. B. ; 146 I. C. 521 : 57 Mad. 89.

(2) *Official Receiver v. Sankralynga Mudaliar*, A. I. R. 1921 Mad. 204 : 62 I. C. 495 : 44 Mad. 524 ; *Mukti Ram Marwari v. Ganga Ram*, A. I. R. 1933 Patna 619 : 146 I. C. 252 : 13 Pat. 30.

52. was free to prosecute his claim in the ordinary courts, while the insolvency proceedings were at the same time being taken against the debtor. Under the old section the only receiver to whom property was to be delivered was the receiver appointed after the order of adjudication for the simple reason that the section came into action only after an order of adjudication had been passed. Under the present section the legislature, while making the amendment in regard to the operation of section 52, overlooked to make clear the meaning of the word "receiver" in the section. The result has been a conflict of decisions

Analogous law.—Section 53, Presidency-towns Insolvency Act is exactly the same as section 35 of the Act III of 1907. Section 41, B. A., 1914, is as follows :—

"41. (1) Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof, for the purpose of satisfying the charge.

(2) Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

It will be seen that the scope of the English section is wider than the corresponding sections of the Indian Acts, and the English section curtails the rights of execution creditors to a greater extent. The present section of the Provincial Insolvency Act is wider in its scope than the corresponding section of the Presidency-towns Insolvency Act.

Object and Scope.—The object of section 52 is not to give an advantage to the insolvent, but to prevent individual creditors from deriving unfair advantage over other creditors and to place the property in the hands of a receiver for equal distribution to the general body of creditors (1). It applies to a state of affairs antecedent to what is contemplated by section 51 (2). The section requires that the executing court should have notice of the insolvency petition and that there should be an application praying for the delivery of the property, if in the possession of the court, to the receiver. If the prescribed conditions have been fulfilled, the executing court has no other duty to perform than to direct the delivery of the property in question to the receiver and it remains no longer competent to investigate or decide questions of title in dispute between the insolvent debtors and any other court, judgment-debtor

(1) *Tirpit Thakkur v. Mahanath*, 125 I. C. 783 : A., I. R. 1930 Pat. 406.

(2) *Official Receiver, Jullundur v. Labhram*, 14 Lah. 724 : 144 I. C. 580 ; A. I. R. 1933 Lah. 477.

or stranger (1). The section is peremptory in its terms. Where prior to the date fixed for sale of immovable property in execution of a decree, the judgment-debtor had applied to be adjudicated and the *interim* receiver applied to the court to adjourn the sale the court was held bound to stay the sale and direct delivery of possession to him (2). The only order which the court can make on an application under section 52 is that such property be delivered to the receiver, if such receiver has already been appointed; if no such receiver has been appointed, the court shall proceed with the execution but hold the sale proceeds subject to such orders as the insolvency court may pass in the matter (3). But where the court has no notice of insolvency proceedings, it can continue the execution proceedings (4).

Does the section apply to immovable property?—There is a conflict of opinion whether the word “property” in this section is confined to movables only, or it also includes immovable property. It has been held in Sind that section 52 contemplates the delivery of property in the possession of the court and thereby restricts its operation to such movable property which is seized by the court under O. 21, C. P. C., relating to attachment of property by seizure or which is attached by the court in such manner as to get possession of such property. Therefore it does not apply to immovable property attached under O. 21, r. 54, C. P. C., or debts due to the debtor which are attached by the issue of a prohibitory order under O. 21, r. 46 (5). A contrary view has, however, been taken by the Bombay (6), Calcutta (7), Lahore (8), Nagpur (9) and Madras (10) High Courts. The reasons for the latter view were thus explained in the Calcutta ruling :—

“The opening words of section 52 refer to attachment of any kind of property which is saleable and need not be confined to movable properties alone. Where immovable property is attached in execution of a decree it is commonly stated that the property is in custody of the court and there is no reason to suppose that the legislature meant that the attaching decree-holder would have a charge for his costs where movable property is attached but he would be entitled to no such relief if immovable property is attached by him, although the proceedings relating to the attachment of the property are taken at considerable cost of money and trouble. The true construction is that section 52 refers to the case of

(1) Official Receiver, *Kistna v. Gogineni Kodandarmayya*, A. I. R. 1935 Mad. 651 : 157 I. C. 826 : 58 Mad. 1056.

(2) *Sivaswami Odayar v. Subramania Iyer*, A. I. R. 1932 Mad. 95 : 55 Mad. 316 : 136 I. C. 338.

(3) *Tirpit Thakkur v. Mahanath*, 125 I. C. 783 : A. I. R. 1930 Pat. 406.

(4) *Chandulal-Laxmi Narayan v. Bhikam Chand-Ram Chand*, A. I. R. 1936 Nag. 41 : A. I. R. 1936 Nag. 117 : 163 I. C. 127.

(5) *Lyon Lord & Co., v. Firm of Virbhandas-Rattanchand*, 76 I. C. 380 : A. I. R. 1926 Sind 199 ; *Firm of Lyon Lord & Co., v. Virbhandas-Rattanchand*, 76 I. C. 380 : A. I. R. 1924 Sind 69.

(6) *Mahasukha Jhaverdas v. Valibhai Natubhai*, 109 I. C. 152 : A. I. R. 1928 Bom. 177.

(7) *Haranchandra v. Joychand*, A. I. R. 1929 Cal. 524 : 57 Cal. 122.

(8) *Aziz-ud-Din-Feroz Din v. Niamat Ali*, A. I. R. 1930 Lah. 970 : 129 I. C. 213.

(9) *Laxmi Oil Mills v. Sukh Deo-Kanhaiya Lall*, A. I. R. 1936 Nag. 120.

(10) *Sivaswami Odayar v. Subramania Iyer* *supra*.

S. 52. attachment of all kinds of properties and is not confined to movable property alone (1)."

Again to quote from the Bombay ruling, the effect of attachment of immovable property under O. 21, r. 54, C. P. C., is that the property attached is kept in *custodia legis* during the period of attachment and, therefore, the court which attaches the property and purports to sell it is in possession within the meaning of section 52 (2).

The difference of opinion turns upon the meaning of the expression 'in the possession of the court.' In the Sind ruling reliance was placed upon the corresponding section 41 of the Bankruptcy Act, 1914, where the word used is "goods." Mr. Mulla has criticised the Sind view in the following words: "The word 'goods' is also used in section 1 (1) (e) of the Bankruptcy Act, 1914, which corresponds to section 9 (e) of the Presidency-towns Insolvency Act and section 6 (e) of the Provincial Insolvency Act. It cannot possibly be suggested that the word 'property' in section 9 (e) and 6 (e) is confined to movables only. The reason why the two English sections are confined to goods is to be found in the peculiarities of the English law as to real property" (3).

The section will apply to immovable property which has been attached and not any other property, the reason being that without attachment no property can be said to be in possession of the court. Therefore immovable property which has not been attached and which is sought to be sold on the ground that the decree created a charge upon it cannot be said to be property in the possession of the court within the meaning of section 52, Provincial Insolvency Act and an *interim* receiver cannot apply to have its sale stopped (4). It is submitted that the section does not necessarily apply to all kinds of property which can be attached. The section further requires that the property should be such as to be saleable in execution. Now there are certain properties which can be attached but cannot be sold. A very clear instance is to be found in the case of attachment of a decree due to the debtor from a third person. Under certain provincial Acts relating to the land of agriculturists, land can be attached but it cannot be sold. It appears that in such cases the decree holder can proceed to realise his debt or decree even if he has notice of the insolvency proceedings by obtaining a temporary alienation of the judgment debtor's property.

Sale held after notice.—On the plain meaning of the section it appears that the section applies only if two conditions are satisfied. They are, firstly, that notice should have been given to the executing court of the admission of the insolvency petition and secondly, that the application should have been made to that court for delivery of the property to the receiver (5). It is only when an application is made to the executing court for the delivery of the property that the court is required by section 52 to direct the property, if in its possession, to be delivered to the receiver. It has, therefore, been held by the Lahore High Court, following the English case, *Woolford's*

(1) *Haranchandra v. Joy Chand*, A. I. R. 1929 Cal. 524 : 57 Cal. 122 : 123 I. C. 737.

(2) *Mahasukh Jhaverdas v. Valibhai-Natubai*, 109 I. C. 192 : A. I. R. 1928 Bom. 177.

(3) *Mulla's Law of Insolvency*, 1930 Edition, p. 427.

(4) *Ethirajulu Chettiar v. Official Receiver, West Tanjore*, 56 Mad. 453 : 141 I. C. 817 : A. I. R. 1933 Mad. 152.

(5) *Ram Gopal-Ram Parsad v. Guluamal-Ghasiram*, A. I. R. 1930 Lah. 851 : 128 I. C. 292.

Trustee v. Levy, (1892) 1 Q.B. 772, that where no such application is made the court is at liberty to sell the property and the sale being legal cannot be impeached by the receiver or the creditors (1). The Lahore view has been followed by the Rangoon High Court (2). The contrary view to the effect that the court should stop the sale as soon as it is apprised of the pendency of the insolvency application, even if no application for delivery of possession of the property is made, has been taken by the Calcutta High Court (3). The learned judges adopted the opinion of Sir Dinshaw Mulla as expressed in his book on page 426. The Lahore view was expressly dissented from on the grounds stated by Mr. Mulla in his book and which may be quoted here with advantage :—

S. 52.

“In support of its judgment the court relied upon *Trustee of Woolford's Estate v. Levy*, 1822, 1 Q. B. 772, a case under section 46 of the Bankruptcy Act, 1883. In that case it was held that a sale by the sheriff after a receiving order in execution of a decree against the debtor, though made with notice of order, was valid as against the trustee in bankruptcy appointed after adjudication, if no application was made by the Official Receiver under that section for delivery of the property to him. The distinguishing features of that case are, first, that the sheriff after he came to know of the receiving order communicated with the Official Receiver and the Official Receiver wrote to the sheriff asking him to realise the goods and to account to him for the sale proceeds, and, secondly, that the receiving order under the English law does not vest the debtors' property in the Official Receiver as an adjudication order vests it in the trustee in bankruptcy. The Lahore decision, it is submitted, is erroneous” (4).

Receiver : does it include an interim receiver ?—It has been held by the Sind High Court that the receiver referred to in section 52 is the receiver appointed under para 1 of section 56 of the Act after the passing of an order of adjudication, and not the interim receiver appointed under section 20 of the Act (5). The same view was expressed in a Lahore case where it was remarked that a receiver under the section means a receiver who has power to sell and such a person can only be a receiver appointed after adjudication (6). A different view has been taken by the Bombay (7), Calcutta (8), Madras (9), Allahabad (10), Nagpur (11) and the subsequent

(1) *Rallaram v. Ramlabhayamal*, 80 I. C. 509 : A. I. R. 1925 Lah. 158.

(2) *P. M. Chettyar Firm v. A. K. A. C. T. A. L. Chettyar Firm*, A. I. R. 1935 Rang. 317 : 13 Rang. 534 : 158 I. C. 859 ; See also the opinion of Venkatasubba Rao, J., in *Muthan Chettiar v. Venkiteswami*, A. I. R. 1935 Mad. 819 on p. 821.

(3) *Mahendrakumar v. Dineshchandra*, A. I. R. 1933 Cal. 561 : 60 Cal. 696 : 146 I. C. 597.

(4) Mulla's Law of Insolvency in India, P. 426.

(5) *Lyon Lord and Co. v. Firm of Virbhandas Rattan Chand*, A. I. R. 1926 Sind 199 : 19 S. L. R. 35 : 76 I. C. 380.

(6) *Ramgopal Ramprasad v. Gulumal Ghasiram*, A. I. R. 1930 Lah. 851 : 128 I. C. 292.

(7) *Mahasukha Jhaverdas v. Valibhai Natubai*, 109 I. C. 152 : A. I. R. 1928 Bom. 177 (1).

(8) *Mahendra Kumar v. Dineshchandra Roy*, 60 Cal. 696 : 145 I. C. 597 : A. I. R. 1933 Cal. 561.

(9) *Sivaswamy Odayar v. Subramania Iyar*, A. I. R. 1932 Mad. 95 : 55 Mad. 316 : 135 I. C. 338 ; *Muthan Chettiar v. Venkiteswami*, A. I. R. 1935 Mad. 819.

(10) *Firm Ghanshandas v. Hanumanprasad*, A. I. R. 1934 All. 444 : 148 I. C. 417.

(11) *Laxmi Oil Mills v. Sukhdev Kanhaiya Lall*, A. I. R. 1936 Nag. 120 : 161 I. C. 661.

3. 52. decisions of the Lahore (1) High Courts. The ground of these decisions is that the section, as now amended, contemplates the presentation of an application, not, as it used to be, after adjudication but at an earlier stage *i.e.*, after an insolvency petition has been admitted; and that at that stage, the only receiver that can be in existence for the purpose of applying is the interim receiver (2).

In the Lahore case, *Bishan Singh v. Gurmukh Ram Wadhawa Ram* (3), it was remarked that according S. 52, P. I. A., as now amended, there is no difference between a receiver appointed after adjudication and an interim receiver so far as the right of a decree holder in a simple money decree to execute his decree by attachment and sale of the insolvent's property is concerned, and that such property vests in the interim receiver in the same manner as in a receiver appointed after adjudication. It is submitted, with respect, that the language used in the Lahore decision does not appear to be quite accurate. There is no question of vesting of the insolvent's property, against which execution has issued, under section 52. The only question which arises is the receiver's right to apply for delivery of possession of the insolvent's property attached but not sold by the executing court.

An interim receiver has a right to apply, but it is necessary that the receiver should be clothed by the insolvency court with powers to take possession of the insolvent's property. Unless this is done, the interim receiver's application to the executing court to deliver property to him cannot be a valid application (4). Again, the section does not expressly provide that the application must be made by the receiver and nobody else. Accordingly it has been held that the section gives a right to the insolvent to make such an application but it is necessary that the application must be made for the general body of creditors and not for the insolvent (5).

The section says that the property is to be delivered to the receiver. It has therefore been held that section 52 does not come into operation where there is no receiver in existence till after the sale in execution of a decree (6). The decision appears to overlook section 58 which provides that, where no receiver is appointed, the court shall have all the rights of, and may exercise all the powers conferred on a receiver under this Act (7).

Costs of the suit and execution.—The costs of arbitration under the Indian Arbitration Act cannot be treated as costs of the suit within the

(1) *Madhoram Budhsingh v. Raj Kishan*, 138 I. C. 821: A. I. R. 1932 Lah. 471: 14 Lah. 63; *Bishan Singh v. Gurmukh Ram Wadhawa Ram*, 141 I. C. 47: A. I. R. 1933 Lah. 192.

(2) *Sivaswami Odayar v. Subramania Iyar*, A. I. R. 1932 Mad. 95: 136 I. C. 338: 55 Mad. 316.

(3) A. I. R. 1933 Lah. 192: 14 I. C. 47.

(4) *Arunachalam Chettiar v. Naganna Naicker*, 94 I. C. 126: A. I. R. 1926 Mad. 606.

(5) *Tirpit Thakkur v. Mahanth Ramperkash*, 125 I. C. 783: A. I. R. 1930 Patna 406.

(6) *Sahu Durga Sarn v. Beni Parshad*, 146 I. C. 832: A. I. R. 1933 All. 559; *Jogendra Nath Kundu v. Jogneswar Mandal*, 63 Cal. 176: 158 I. C. 574: A. I. R. 1935 Cal. 612.

(7) See *P. M. Chettyar Firm v. A. K. A. C. T. A. L. Chettyar Firm*, 13 Rang. 534: 158 I. C. 859: A. I. R. 1935 Rang. 317.

meaning of section 52 of the Act (1). The costs of execution include the costs of a suit brought by the decree-holder under O. 21, R. 63, C. P. C., in which the creditor succeeded in having the order releasing the property from attachment set aside. The reason is that the decree in the suit revives the attachment and the proceedings in the suit should be considered as proceedings in furtherance of the execution (2). **S. 52.**

Power under the section can be exercised by the executing court only.—Where property of a debtor is attached in execution of a decree and subsequent to it an interim receiver is appointed by the insolvency court admitting a petition for insolvency of the debtor, it is only the executing court that can pass an order under section 52 on an application made to it and not the insolvency court (3). Where, however, the insolvency court has already stayed the execution proceedings on an application by the petitioning creditor, and has also on an application by the decree holder passed an order under section 52, directing the receiver to sell the property for realising the costs of the suit, there are two alternatives, either of which may be adopted. One of these alternatives is for the insolvency court to direct the receiver to make a proper application to the executing court and the other alternative is for the decree-holder to apply to the executing court for the sale of the property under attachment in order that their dues may be realised, in which case the insolvency court has to vacate the stay order which it has already passed (4). The section contemplates the sale of the property for the purpose of satisfying the charge by the receiver. It does not however say under whose directions the receiver is to sell the property. It is submitted that the executing court, at the time of delivering property to the receiver, should direct the sale of the property by the receiver and ask him to deposit the sale proceeds sufficient to satisfy the charge relating to the costs of the suit and the execution.

Section does not apply to secured creditors—Section 51 expressly saves the rights of secured creditors. There is no similar provision in the present section, yet, having regard to the general policy and scheme of the insolvency laws in not touching the secured creditor, it has been held that the section does not apply to secured creditors; and it is immaterial as to when and in which proceedings the security is acquired (5).

Miscellaneous.—Where an interim receiver is appointed pending an application to declare a certain person as insolvent, it is to the date of application for adjudication as insolvent that we are to look as the commencement of insolvency, and not to the date of the appointment of the receiver. Hence if, after the application for adjudication as insolvent but before the appointment of the interim receiver, any assets of the debtor are attached

(1) *Lyon Lord & Co., v. Firm of Virbhandas Rattanchand*, A. I. R. 1926 Sind 199 : 76 I. C. 380.

(2) *Haranchandra v. Joychand*, A. I. R. 1929 Cal. 524 : 57 Cal. 122 : 123 I. C. 737.

(3) *Mathuresh Chakrawarty v. S. R. Mills Co., Ltd.*, A. I. R. 1935 Cal. 150 : 155 I. C. 79; *P. M. Chettiar Firm v. A. K. A. C. T. A. L. Chettiar*, A. I. R. 1935 Rang. 317 : 13 Rang. 534 : 158 I. C. 859.

(4) *Mathuresh Chakravarty v. S. R. Mills supra*.

(5) *Official Receiver v. Nagaratana Mudaliar*, 92 I. C. 497 : A. I. R. 1926 Mad. 194, (security was taken in execution proceedings); *Daulat Ram Chhag Mal v. Sundarmal Ramchand*, 133 I. C. 282 : A. I. R. 1931 Lah. 293, (execution proceedings were stayed against the judgment debtor by the High Court in appeal on condition that the judgment-debtor executed a registered mortgage deed of the land attached in favour of the decree-holder.)

- S. 53. by any creditor the proceeds should not be paid to the attaching creditor until the fate of the adjudication application is known (1).

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

History.—Section 36 of the Act 3 of 1907 ran as follows:—"Any transfer of property not being a transfer made before, and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the receiver, and may be annulled by the court."

The word 'voidable' was substituted in place of the word 'void' when the Act of 1920 was passed. It was to make clear that the word 'void' was used in the old section as meaning voidable. The words "on a petition presented" were inserted after the words "is adjudged insolvent" by section 6 of the insolvency law (Amendment) Act, X of 1930. The amendment set at rest a serious conflict of opinion which the interpretation of the section had given rise to. The conflict was on the point as to whether section 28 (7), the relation back clause, controlled section 53, thus making the period of two years as commencing from the date of the petition and not from the date of the order of adjudication.

Analogous Law.—The section is based on S. 47, B. A., 1883, which is now reproduced in S. 42, B. A., 1914. The history of the English section begins with 1 Jac. 1, c. 15, S. 5. Under that statute and under 6 Geo. 4 c. 16, S. 73, and the Bankruptcy Act, 1849, section 26, the avoidance of a voluntary settlement was effected by an order in bankruptcy for the sale by the trustee in bankruptcy of the subject-matter of the settlement. Neither the word "void" nor the word "voidable" was used (2). No such mode of avoidance was prescribed by the Bankruptcy Act, 1869, or by the Act of 1883, nor is it prescribed by the Act of 1914, but the settlements are declared to be void against the trustee in bankruptcy. Section 42 (1) and (4) is as follows:—

"(1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years

(1) *Firm of Adamjee Jafferji v. Firm of Basrio Fadu*, 89 I. C. 330 : A. I. R. 1926 Sind 77.

(2) *Re Brall*, 1890, 2 Q. B. 381, 384.

after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof." **S. 53.**

(4) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

English cases decided on the wording of the English section have been followed in interpreting the Indian sections by the Indian High Courts and the Privy Council.

The corresponding S. 55, P-t. I. A., 1909, is the same as S. 53, P. I. A., 1920, except for the verbal difference that the word 'void' instead of the word 'voidable' occurs in the former. The scope of the two sections is, however, the same and it has been held that if a deed (hypothecation bond) comes within the meaning of S. 55, P-t. I. A., it would certainly be void under S. 53, P. I. A. (1).

Transfer of property.—In the marginal note the words given are 'voluntary transfer.' The expression is not limited to any particular form of alienation of the property by the insolvent; it covers all sorts of devices to deprive creditors of the benefit of the property of the insolvent (2). Thus a court sale in execution (3), deed of release accompanied by mutation, and transfer by mutation (4), decree passed on confession of judgment by insolvent (5), partition of joint family property (6), a consent decree passed in a suit (7), a decree on an award (8) and a remission of a debt without consideration (9) have been held to come within the scope of this section. A deed by an insolvent constituting a person in fact a selling agent comes within the meaning of section 53. Any transfer of property must mean a transfer recognised by the general law (10).

The words in the English section are "any settlement of property." The words have been held, having regard to the wide definition of the word "property" in the English Act, to include bills, bonds, notes, securities, shares, etc. In the earlier English Acts the word "conveyance"

(1) *A. S. N. Firm v. N. N. Firm*, A. I. R. 1933 Rang. 424 : 147 I. C. 796.

(2) *Kanahya Lal v. Official Receiver of the property of Chimanlal Garba*, 110 I. C. 742 : A. I. R. 1928 Lah. 750.

(3) *Rama Brahmam v. Andalamma*, A. I. R. 1931 Mad. 597 (a) : 135 I. C. 544.

(4) *Amjad Ali v. Nandlal Tandon*, 123 I. C. 217 : A. I. R. 1930 Oudh 314.

(5) *Kanahya Lal v. Official Receiver of the property of Chiman Lal Garba*, 110 I. C. 742 : A. I. R. 1928 Lah. 750.

(6) *Official Receiver Lahore v. Chiman Lal*, 123 I. C. 286 : A. I. R. 1930 Lah. 645.

(7) *In re Narindar Dass Sunder Dass*, 93 I. C. 331 : A. I. R. 1926 Sind 133.

(8) *Isamboddin Ajmoddin v. Ajmoddin Shamsoddin*, A. I. R. 1936 Bom. 176.

(9) *Official Assignee Madras v. A. Kanniah Naidu*, A. I. R. 1935 Mad. 1009.

(10) *Official Receiver of Cuddapah v. Kopparapu Subbian*, 105 I. C. 138 : 50 Mad. 815 : 26 Mad. L. W. 248 : 1928 M. W. N. 9 : A. I. R. 1927 Mad. 869 : 53 M. L. J. 722.

S. 53. was used and not "settlement." Under those Acts, it was held that money could not be a subject of conveyance and therefore did not come within the section (1). Now in England money is expressly included in the description of property and as such it can be the subject of transfer, conveyance or settlement. It will, however, be so only if the money is transferred or settled as *property* and not otherwise. The law was thus stated by Lord Alverstone, M. R., in *Re Plummer* (2).

"If there is a gift of money or proceeds of property which can be traced, and the money or proceeds is or are intended to be retained or preserved as the property of the donee, that money or those proceeds will be property in 'settlement.' On the other hand, if there is a gift of money or proceeds, but it is not intended that the money or the proceeds shall be retained by the donee in the form of money, but shall be expended at once, that will not be a 'settlement'."

Thus it has been held that a gift to a son of money to enable him to commence business is not within the section, for the gift is intended to be expended at once (3); but a gift of jewels from a husband to his wife, or of money with which to buy herself a present, is a settlement, even if there is no restriction on the power of alienation by the donee, for it must be taken that the husband intended that the wife should retain and use the gift. Such a gift is within the section, and if the wife has still retained the property, the trustee in bankruptcy will be entitled to it (4). A bankrupt within two years of his bankruptcy in order to assist his nephew, who obtained a lease of a public house, purchased and had fixed on to the public house a large clock and the lessors, in consideration of such fixture, reduced the nephew's rent. The trustee claimed the clock or its value as the subject of a voluntary settlement. The Court of Appeal held that the clock was transferred to the lessors for value, and that there was no gift of clock to the nephew as a chattel, and no retention of the property in it by him, that the transaction was not a voluntary settlement and that, therefore, the trustee had no claim (5). Where the owner of a policy on his life by a post-nuptial settlement made more than ten years before his bankruptcy assigned the policy to trustees, and continued to pay the premiums voluntarily, though under no covenant or agreement to do so, it was held that the trustee was not entitled to any portion of the policy money and that none of the payments of premiums amounted to a settlement (6).

Conditions of applicability.—In order that the transfer may be voidable as against the receiver it is necessary that the following conditions should be satisfied :—

- (a) the transfer should be a transfer of the property of the insolvent ;
- (b) the transfer should not be one made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith or for valuable consideration ; and

(1) *Kensington v. Chantler*, 3 M. and S. 36; *Exp. Shorland*, 7 Ves. 88; *Exp. Skerrett*, 3 Rose, 384.

(2) (1900) 2 Q. B. 790.

(3) *Re Player*, 1885, 15 Q. B. D. 682.

(4) *Re Vansittart*, 1893, 1 Q. B. 181 : 9 Mor. 280.

(5) *Re Branson*, (1914) 3 K. B. 1036.

(6) *Re Harrison and Ingram*, (1900) 2 Q. B. 710.

(c) the transferor must have been adjudged insolvent on a petition presented within two years after the date of transfer. **S. 53.**

We have already considered the meaning of the word "transfer." We shall now proceed to consider the other conditions.

Transfer made before and in consideration of marriage.—Such transfers are very frequent in England and that is the reason why there are special provisions in sub-sections (2) and (3) of S. 42. B. A., 1914. In India these transfers are very infrequent. Amongst Mohammedans marriage is considered to be a contract and there is always a provision for the payment of prompt and deferred dower by the husband in consideration of the marriage contract. Transfers of property frequently take place for payment of dower money. Transfers for payment of deferred dower are, however, not considered to be in consideration of marriage. The dower debt stands on the same footing as any other ordinary debt and the fact that the liability to pay it arose out of the marriage contract does not make it in any way different from an ordinary debt. Such transfers are protected only when they are entered into in good faith and for valuable consideration.

Purchaser or incumbrancer.—The words are borrowed from the corresponding English section. The leading English case is *Hance v. Harding* (1). There it was held that the word "purchaser" means a person who has given valuable consideration, not a purchaser in the legal sense of the word, and comprises a person who has given a value in order to obtain property for a third person as well as a person who has given value in order to obtain it for himself. It was held by a majority of the Court of Appeal that the lease of a right or the compromise of a claim is sufficient, and consequently a post-nuptial settlement was upheld where the consideration was that the settlor's wife refrained from taking proceedings against him in the divorce court (2). The English interpretation of the word 'purchaser' has been followed in India (3). It has therefore been held in India also that the word 'purchaser' includes a trustee.

Valuable consideration.—The expression 'valuable consideration' means money or money's worth and 'valuable' means real as distinguished from a consideration that is merely illusory or nominal, but not necessarily meaning equivalent. It would be valuable if it is not so small as to be negligible when the value of the property is to be taken into account (4). The word, 'consideration' is defined in section 2 clause (b), Contract Act; and English cases on the meaning of the word have been followed in India. It means something advantageous to the promisor or to a third person or which is onerous or disadvantageous to the promisee (5). Accordingly it has been held that a trustee gives valuable consideration and the trust is a transfer for valuable consideration because by taking

(1) 20 Q. B. D. 732.

(2) *Re Pope*, 1908, 2 K. B. 169; and see *Re Macdonald*, 1920, 1 K. B. 205 and *Re Charters*, 1923, B. & C. R. 94.

(3) Official Receiver of Trichonopoly v. Somasundaram Chettiar, 34 I. C. 402; A. I. R. 1917 Mad. 102; (Chaudhari) Sharaff uz-zaman v. Deputy Commissioner, Bara Banki, 79 I. C. 888; A. I. R. 1925 Oudh 28.

(4) Banerji v. Mangal Prasad, 137 I. C. 236; 1932 A. L. J. 53; A. I. R. 1932 All. 243.

(5) *Currei v. Misa*, 1888, 10 Ex. 153; *Mahammudunissa Begam v. J. C. Bachelour*, (1905) 29 Bom. 428.

- S. 53.** upon himself the task of discharging the duties of a trustee, the trustee takes upon himself some onerous work (1).

It may be noted that under section 53, Transfer of Property Act, a transfer is protected where the transferee acts in good faith and gives valuable consideration and cases decided under that section may be usefully referred to for interpreting the present section. In a Calcutta case, where the facts were somewhat peculiar, it was held that a surrender by an insolvent tenant in favour of the landlord with notice of a previous agreement to sell in favour of a third person is not a transfer for valuable consideration (2). The release of a right to sue for a breach of trust is a valuable consideration (3). Where a post-nuptial settlement provided that the trust should be revocable at the request of the settlor with the consent of the trustees, and they consented to a partial revocation upon the terms of the settlor making an assignment to them of other property upon a discretionary trust, and subject thereto, upon the trust of the original settlement, it was held that the trustees were not purchasers for value, and that the second settlement was void as against the trustee in bankruptcy so far as it might be necessary to pay the debts (4). A gift by a husband to his wife is a transfer without consideration and will be set aside under this section (5). A transfer, however, by a Mohamaden husband to his wife for dower due to her may be for a valuable consideration but it is liable to be set aside if it is proved to have been effected with a view to defraud the creditors and that to the knowledge of the wife (6). A trustee under a deed of transfer executed by a debtor for the benefit of the general body of creditors is not a purchaser for valuable consideration (7). The fact that a conveyance is expressed to be, on the face of it, for valuable consideration does not oblige the court in all events to hold it to be for valuable consideration (8); nor does the fact that the conveyance is apparently voluntary excludes evidence to show that there was in fact consideration (9).

Onus of proving want of good faith and valuable consideration.—

Prior to the decision of their Lordships of the Privy Council in *Official Receiver v. P. L. K. M. R. M. Chettyar Firm* (10), it was uniformly held by all the High Courts in India that the onus of proving good faith and valuable consideration was upon the transferee. All that the receiver had to prove was that the transfer took place within two years of the date of petition and that it was for the transferee to show that he acted in

(1) *Official Receiver of Trichanopoly v. Somasundaram Chettiar*, A. I. R. 1917 Mad. 102 : 134 I. C. 402; *Sharaff-uz-Zaman v. Deputy Commissioner, Barabanki*, 79 I. C. 888 : A. I. R. 1925 Oudh. 28.

(2) *Syed Mohammad Maliah v. Choudhari Mohammad Ismail Khan*, A. I. R. 1927 Cal. 766 : 104 I. C. 822.

(3) *Re Collins*, 112 L. T. 87.

(4) *Re Parry*, 1904, 1 K. B. 129.

(5) *Bhutnath v. Biraj Mohini*, 1918, 28 C. L. J. 536 : 47 I. C. 524.

(6) *Muhammed Habib Ullah v. Mushtaq Husain*, 39 All. 95 : 37 I. C. 684.

(7) *Official Receiver Cuddapah v. Subbia*, 50 Mad. 815 : 105 I. C. 138 : A. I. R. 1927 Mad. 869, dissenting from *Official Receiver of Trichanopoly v. Somasundaram Chettiar*, A. I. R. 1917 Mad. 102 : 34 I. C. 402.

(8) *Walker v. Burrows*, 1 Atk. 93.

(9) *Pott v. Todhunter*, 2 Coll. C. C. 76; *Re Pope*, (1908) 2 K. B. 169.

(10) *Official Receiver v. P. L. K. M. R. M. Chettyar firm*, 58 I. A. 115 : 9 Rang. 170 : 131 I. C. 767 : A. I. R. 1931 P. C. 75.

good faith and gave valuable consideration for the transaction (1). All the decisions of the Indian High Courts on the section are coloured by this view in considering the questions of good faith and valuable consideration and the *bona fides* of the transactions generally. In 1931 the Privy Council, however, held that the onus of proving the fraudulent nature of a transaction impeached under section 53, Provincial Insolvency Act, lies on the petitioner and not on the person in whose favour the transfer is made. Their Lordships followed an earlier decision of their own on section 50 of Ordinance No. 44 of the Straits Settlement (2). The Privy Council decision has now been followed by the Indian High Courts and the onus is under the present law on the official assignee to prove want of good faith and *bona fides* on the part of the transferee (3).

The onus of proving the fraudulent nature of the transaction lies on the official receiver or the creditors in the first instance. But where detailed allegations are made and some of the allegations are admitted, it may not necessarily be so. In such a case the court should consider the admitted circumstances and consider the question of the allocation of onus after consideration of those admitted facts (4). If the issue framed throws the onus wrongly on the purchaser and he raises no protest at the time and acquiesces in it by leading

(1) *Bansi Lall v. Ranglal*, A. I. R. 1923 Nag. 27 : 71 I. C. 979 ; *Gopal v. Ramkrishna*, A. I. R. 1921 Nag. 130 ; *Rowther v. Kumara Chakrawarthi Iyengar*, 36 I. C. 906 : A. I. R. 1917 Mad. 888 ; *Phula Shah v. Ram Shah*, 101 I. C. 588 : A. I. R. 1927 Lah. 415 ; *Basanti Bai v. Nanhemal*, 89 I. C. 357 : 47 All. 864 : A. I. R. 1926 All. 29 ; *Official Receiver v. Lachhmibai*, 92 I. C. 5 : A. I. R. 1926 Sind. 140 ; *Official Assignee of Madras v. Sambanda Mudaliar*, 60 I. C. 205 : 43 Mad. 739 : A. I. R. 1920 Mad. 977 ; *Hemraj Champalal v. Ram Kishan Ram*, 2 P. L. J. 101 : 38 I. C. 369 : A. I. R. 1916 Pat. 279 ; *Nilmoni Choudhri v. Basant Kumar Bannerjee*, 29 I. C. 814 : A. I. R. 1915 Cal. 434 ; *Anant Rama Aiyer v. Yussuffji Omer Sahib*, 36 I. C. 903 : A. I. R. 1917 Mad. 749.

(2) *Official Assignee of the estate of Cheah Soo Tuan v. Khoo Saw Cheow*, 128 I. C. 655 : A. I. R. 1930 P. C. 290.

(3) *Narayan Ayyar v. Official Receiver*, A. I. R. 1934 Mad. 294 : 150 I. C. 339 ; *Sant Narayan v. Alim-ud-Din*, A. I. R. 1934 Oudh 368 : 150 I. C. 835 ; *Raghunath Kishandas v. Official Receiver, Peshawar*, A. I. R. 1934 Pesh. 126 : 153 I. C. 90 ; *Ram Chandra v. Prithwi*, 145 I. C. 524 (1) : A. I. R. 1933 Pat. 564 (1) ; *Susarmoy Sen v. Bibihuti Bhushan*, 147 I. C. 449 : A. I. R. 1933 Cal. 689 ; *Amolak Rao v. Dhondiba*, 144 I. C. 844 : A. I. R. 1933 Nag. 188 ; *Hagemeister v. V. Po Chow*, A. I. R. 1935 Rang. 53 : 12 Rang. 625 : 153 I. C. 395 ; *Pullaya v. Official Receiver of Krishna*, 143 I. C. 372 : A. I. R. 1933 Mad. 271 ; *Harry Pope v. Official Assignee, Rangoon*, A. I. R. 1934 P. C. 3 : 12 Rang. 105 : 146 I. C. 743 ; *Bhagat Ram v. Puranchand*, 140 I. C. 598 : A. I. R. 1933 Lah. 43. (The remarks of the court on the point are somewhat confused and apparently it appears from the court's unfavourable criticism of the Privy Council ruling that it was not inclined to follow it) ; *Ratan Chand v. Pramatha Nath*, 158 I. C. 1017 : A. I. R. 1935 Cal. 650 ; *Subramania Chettiar v. Official Receiver of Madura*, 1932 M. W. N. 59 ; *Girish Chandra Seal*, In the matter of, A. I. R. 1936 Cal. 212 : 162 I. C. 650 ; *J U Ba Saing v. Ma Shein*, A. I. R. 1936 Rang. 508 : 14 Rang. 383 : 165 I. C. 810 ; *Umeshchander Seal v. Falkner*, 138 I. C. 741 : A. I. R. 1932 Cal. 621 ; *Official Assignee of Calcutta v. Ram Chandra Kashera*, 60 Cal. 1278 : 149 I. C. 861 (1) : A. I. R. 1934 Cal. 54.

(4) *Amolak Rao v. Dhondiba*, A. I. R. 1933 Nag. 188 : 144 I. C. 844 ; *Bhagmall v. Lala Kishan Lall*, A. I. R. 1937 Lah. 441 ; *Sawanram v. Fatehchand*, A. I. R. 1937 Lah. 801 : A. I. R. 1937 Rang. 276.

53. evidence, the court cannot ignore the evidence. If the evidence led by the purchaser shows the suspicious nature of the transaction the transfer can be annulled (1). The onus may shift at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained; the question of onus becomes important only if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it (2).

The onus laid upon the receiver is discharged if he proves that the transfer was made within two years of the insolvency and also that it was made either not *bona fide* or without valuable consideration. It is not necessary for him to prove the absence of both good faith and valuable consideration (3).

The rule of onus laid down by the Privy Council has not escaped criticism. It has been remarked that it imposes an unreasonable and unfair burden on the receiver (4).

Good faith.—In order that a transaction may be protected under the section, it is necessary that the purchaser should have acted in good faith. All that is necessary is that he himself should have acted in good faith; it is not necessary that both parties should have so acted (5). The question of good faith is a question of fact and depends upon the circumstances of each case. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole where the question for determination is whether a transfer is a *bona fide* transaction entered into with the object of securing the debt of the transferee (6). It is a mistake to take each fact which militates against the *bona fides* of the transfer, separated from the rest of the facts, and to proceed to demonstrate that it was quite consistent with good faith. A number of facts have to be taken into consideration. Some of the important facts which generally arise for consideration are the following :—

- (i) The relationship of the transferee with the insolvent.
- (ii) Transfer of actual possession and the fact of actual possession before and after the transfer.
- (iii) Payment of consideration and the amount of consideration as compared to the value of the property.
- (iv) The conduct of the parties both at the time and subsequent to the transfer.

(1) *Sant Narain v. Alimuddin*, A. I. R. 1934 Oudh 368 : 150 I. C. 835.

(2) *Robins v. National Trust Co.*, 1927, A. C. 515 (520); *Sime Darby & Co., Ltd., v. Official Assignee of the estate of Lee Pang Song*, A. I. R. 1928 P. C. 77 : 107 I. C. 233.

(3) *Official Assignee v. Subala Dass*, A. I. R. 1936 Rang. 98 : 14 Rang. 109 : 161 I. C. 435; See also *Harry Pope v. Official Assignee, Rangoon*, A. I. R. 1934 P. C. 3 : 146 I. C. 743 : 60 I. A. 362 : 12 Rang. 105 P. C.

(4) *U. Ohn Pe v. Fatima Bibi*, A. I. R. 1936 Rang. 145 : 162 I. C. 202, *per Rankin, C. J.*

(5) *Mackintosh v. Pogose*, (1895) 1 Ch. 505; *Re Tetley*, 3 Mans. 266, 321.

(6) *Seth Ghansham Das v. Uma Pershad*, A. I. R. 1919 P. C. 6 : 50 I. C. 264.

- (v) The financial condition of the debtor and the extent of the transferee's knowledge about it. S. 53.
- (vi) The financial condition of the transferee.
- (vii) The extent to which the property is transferred ; whether it comprises the whole property of the insolvent or merely a portion of it.
- (viii) The effect of the transfer on the insolvent's ability to pay his debts.

In considering a transfer made in lieu of a dower debt, the amount of the debt, the delay in its discharge, the nature of the debt, the genuineness of the transfer and the good faith on the part of the parties and the value of the property transferred are relevant matters (1). The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith also (2). On the contrary, an inadequate consideration will be evidence of want of good faith, which may itself be sufficient for the setting aside of the transfer (3). Again, a document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at (4). In all cases what is to be seen is the intention of the parties. The question for determination is: Was the transfer really intended to be carried out and was it made *bona fide* ? Or was it only a device for screening the property from the reach of his creditors, the insolvent retaining the benefit and ownership of the property with him ? (5).

The question of good faith has been considered in numerous decisions. They are of value only as examples of the circumstances in which the court on the evidence before it in each case was led to one or the other conclusion. We proceed to note some of the decisions but before doing that it will be useful to invite the reader's attention to the words of an eminent English judge, which should be borne in mind in reviewing the authorities. They are, "To my mind the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration" (6).

Instances of cases where the question of good faith was considered.—(i) An insolvent had transferred certain property to his wife in

(1) Mahomed Habib Ullah v. Mushtaq Hussain, A. I. R. 1917 All. 32.

(2) Narayan v. Nathu, 103 I. C. 486 : A. I. R. 1927 Nag. 166 ; Daulat Rao v. Pandurang, A. I. R. 1920 Nag. 63 : 55 I. C. 57 ; Gopal v. Ramkrishna, A. I. R. 1921 Nag. 103 : 62 I. C. 289.

(3) Banerji v. Mangal Prasad, 137 I. C. 235 : A. I. R. 1932 All. 243.

(4) Ramaswami Aiyangar v. Official Receiver Coimbatore, 94 I. C. 535 : A. I. R. 1926 Mad. 672.

(5) Official Receiver v. Veddappa Mudaliar, 82 I. C. 450 : A. I. R. 1924 Mad. 865.

(6) Ecclesiastical Commissioner v. Kino, 14 Ch. D. 213, 225, *per* Brett, L. J., cited with approval by Lord Macnaghten in Colls v. Home and Colonial Stores, 1904, A. C. 179, pp. 191-2.

S. 53. lieu of dower within two years before his adjudication. He continued to be in possession of the property along with his wife, but it was found that the dower debt was genuine and that the value of the property transferred was not incommensurate with the amount of the debt. It was held that the transaction was valid (1).

(ii) One year before the insolvency, finding himself embarrassed, the insolvent transferred his entire immovable property in favour of the father of his son-in-law. The property was at a conservative estimate worth about Rs. 18,000 but the sale price was Rs. 8,000 of which one-half was adjusted towards a liability of the insolvent to the vendee. The other half was alleged to have been paid in the presence of the Sub-registrar, but no account was produced to show wherefrom it came and where it went. The property was valued by lots; the title deeds were produced by the insolvent himself that the house was never in vendee's possession but was occupied by a relative of the vendor's wife. It was held that it was a mere device to withdraw the property from the claims of the creditors and that it should be annulled (2).

(iii) The mortgage was executed in favour of the insolvent's father-in-law and his son, shortly before the application for adjudication was presented. The mortgagees were found not in a financial position to invest the amount in mortgage and the mortgagor insolvent was not able to account for the amount alleged to have been received by him from the mortgagee. The mortgage was set aside (3).

(iv) Certain jewellery and some immovable property was mortgaged to a creditor for the debts due to him on promissory notes. The value of the property mortgaged was not greater than the value of the debts and the mortgagee did not know the existence of other creditors at the time of the transfer. It was held that the transfer was *bona fide* and for valuable consideration (4).

(v) In a petition to annul a mortgage-deed under section 53, it was found that the man who was in charge of the firm business was only the manager of the business and not the principal, that the unchallenged entries in the books bore out his story, that he had advanced the money and had borrowed the same obviously for the express purpose of being able to lend it to the debtors, and there was no affirmative evidence to the contrary. No plausible method of carrying out the fraud, no plausible motive for such a fraud was ever really put before the trial judge at all. Nor was it explained how it could be that these debtors, if they were minded to enter into a transaction, which was not a *bona fide* one, should approach the manager of the branch business and induce him to enter a series of forged entries in his book, because for every one of them, he would eventually have to account to his principal. It was held that the transaction under the circumstances was one of a real mortgage (5).

(1) Basirdin Thanadar v. Mokimabibi, 44 I. C. 915 : A. I. R. 1918 Cal. 540.

(2) Dina Nath v. Ghulam Akbar, 143 I. C. 286 : A. I. R. 1933 Lah. 631.

(3) Bhanjan Ram v. Official Receiver, 99 I. C. 708 : A. I. R. 1926 Lah. 621.

(4) Hagemister v. U. Pocho, A. I. R. 1935 Rang. 53 : 12 Rang. 625 : 153 I. C. 395.

(5) Official Receiver v. P. L. K. M. R. M. Chettyar Firm, 9 Rang 170 ; 131 I. C. 767 : A. I. R. 1931 P. C. 75.

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(vi) By the deed of sale, dated 27th February, 1931, Y, who carried on business as a milliner and dress maker at Rangoon, signed to H the stock in trade then lying in her shop and all her book debts then due and owing, in consideration of payment by H to her bank of the sum of Rs. 20,229, being the amount of her overdraft with the bank. H had guaranteed overdraft with her bank upto the sum of Rs. 25,000 and the banker pressed H for payment. On 16th June, 1931, Y was adjudicated insolvent. It was held that in the absence of any evidence that H knew, when he took the deed of sale, that Y was insolvent, the official assignee failed to prove that the transfer was not made in good faith (1).

(vii) The transaction was found to be a real and not a fictitious one. It was of the whole available assets. But there was no evidence that the transferee knew that the transferor was insolvent when the transfer was made. It was held that want of good faith had not been proved (2).

(viii) The vendee was shown not in any way connected with the insolvent and *prima facie* from the evidence the transaction did not seem to be a colourable one and there was no question of fraudulent preference; it was held that the sale should not be annulled (3).

(ix) Where a person tricked the would-be insolvent into giving him a mortgage by a representation, which was never intended to be carried out, that he would settle with his other creditors, it was held that there was want of good faith and the transaction should be set aside (4).

(x) Where an insolvent executed a sale of his land in favour of a relation and himself retained possession of a portion, it was held that the vendees also were actuated by fraud (5).

(xi) Where a near relation of a debtor purchases substantially the whole of the property of a person in insolvent circumstances with notice of the insolvency he cannot be said to be acting in good faith (6).

(xii) An insolvent nominally transferred certain property of his to one T. The deed directed T to pay certain amounts to one A, a mortgagee, but no payments were made by T. Pending the appeal from an order annulling adjudication, P sold the land to the nephew and son-in-law of the insolvent who paid off out of the consideration, the mortgagee, A. The order annulling the adjudication was reversed. It was held that the conveyance by the insolvent in favour of P was voidable under section 53 as not being in good faith. The transfer was made when the condition of the transferor was shaky, but it was proved that the transferees had no connection with the insolvent firm, that the whole of the property of the firm had not been transferred, that full consideration had been paid and

(1) *Harry Pope v. Official Assignee, Rangoon*, A. I. R. 1934 P. C. 3 : 12 Rang. 105 : 146 I. C. 743, on appeal from and overruling *Official Assignee v. Pope*, 10 Rang. 219 : 139 I. C. 273 : A. I. R. 1932 Rang. 86.

(2) *K. P. A. P. Chettiar Firm v. U. Maung Maung, Receiver*, A. I. R. 1934 Rang. 208 : 153 I. C. 19.

(3) *Ishardas v. Official Receiver, estate of Shivalal Ram*, A. I. R. 1930 Lah. 135.

(4) *A. K. R. M. N. C. T. Firm Chettiar v. Maung Ba Chit*, A. I. R. 1930 Rang. 315 : 128 I. C. 589.

(5) *Palaniappa Mudali v. Official Receiver, Trichanopoly*, 25 I. C. 948 : A. I. R. 1915 Mad. 82.

(6) *Daulat v. Panduram*. 55 I. C. 57 : A. I. R. 1920 Nag. 63,

53. there was nothing to show that the transferees knew that the condition of the transferors was shaky. It was held that in the vicissitudes of business firms do sometimes part with their property to get cash or satisfy old creditors and thus keep their credit in the market. It does not necessarily imply that they are acting *mala fide* nor does it lead to the conclusion that the transferee had become aware of their difficulties (1).

(xiii) If a creditor takes the whole or substantially the whole of the property of his debtor in payment of a past debt, knowing that there are other creditors, he cannot be said to be acting in good faith (2).

(xiv) A vendee who purchased property from a person shortly before that person's insolvency for a price appreciably lower than the real value of the property actuated by an intention to get much larger benefit for himself than he was fairly entitled to as a diligent creditor and conspired with the vendors to defraud or delay his other creditors, is not a vendee in good faith within S. 56, P-t. I. A., and the sale is void against the official assignee (3).

(xv) If an insolvent transfers in favour of one of his creditors to whom he owes much more than the debt due to the transferee and the transferee, also being fully aware of all the circumstances, and in consultation with the insolvent, brings into existence such a transfer deed and antedates the same, and takes such sale deed for a debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, then the transaction cannot be said to have been entered into in good faith (4).

(xvi) Where the property transferred is substantially the whole of the insolvent's estate, there was no hurry and need to arrange for payment of prior debts for which the sale took place, the purchaser does not make any inquiries as to who the creditors are, it was held that the sale was not *bona fide*, notwithstanding the facts that consideration had been paid and possession of the property had been transferred (5).

(xvii) Where the insolvent within two years of adjudication transfers a share in his village to the mortgagee for inadequate consideration and where, though the mortgage was extinguished thereby, no mention was made of it in the sale-deed, it was held that the transfer was fraudulent and void (6).

(xviii) Where the transferee of the property of an insolvent did not know that the debtor was on the eve of bankruptcy and had no intention to cheat other creditors and had no knowledge either that he was purchasing the whole of the property belonging to the debtor or that there were debts due to other creditors, it was held that the transfer was made in good faith (7).

(1) Firm Raghunath Kishan Das, Amritsar v. Official Receiver, Feshawar, A. I. R. 1934 Pesh. 126 : 153 I. C. 90.

(2) Bhagat Ram Bindraban v. Puran Chand, 140 I. C. 598 : A. I. R. 1933 Lah. 43.

(3) Official Assignee v. Abdul Razaq Sahib, 29 I. C. 204 : A. I. R. 1916 Mad. 402.

(4) Official Assignee, Madras v. Sheikh Moideen Rowther, A. I. R. 1927 Mad. 1013 : 103 I. C. 61 : 50 Mad. 948.

(5) Narayan v. Nathu, A. I. R. 1927 Nag. 166 : 103 I. C. 486.

(6) Seth Jaskaran v. Gaiand Prasad, A. I. R. 1922 Nag. 245 : 68 I. C. 460.

(7) Sholapur Spinning & Weaving Co., v. Pandharinath, A. I. R. 1928 Bom. 341.

(xi) Where a person who is in debt transfers all his property to his children, a presumption of fraud arises (1). **S. 53.**

(xii) Where an insolvent, being heavily indebted and being pressed by other creditors for payments lest they may file suits against him, transfers subsequently all his property in favour of his relatives, also creditors, and also falsely declares his inability to pay owing to depression in paddy price, the transfer is fraudulent and must be set aside (2).

(xiii) Where a transfer is shown to have taken place directly after the insolvent had been served with a summons and is one of two transfers by which he got rid of all his immovable property and when the other had been admitted by the transferee to be fraudulent and the transfer was to a mere child, the circumstances require a very full explanation to avoid the inference of fraudulent transfer (3).

Transferor must have been adjudged insolvent on a petition presented within two years of the date of the transfer.—The words 'on a petition presented' were inserted in the section by the amending Act No 10 of 1930, and now, as the section stands, the *terminus a quo* for the calculation of two years is the date of the presentation of the petition. Before the amendment, there was a conflict of decisions whether the period of two years was to be calculated from the date of the order of adjudication or from the date of the presentation of the petition. In other words, the conflict turned upon the meaning of the words 'is adjudged insolvent', which could either refer to the actual date of adjudication or, by applying the doctrine of relation back, to the date of the presentation of the petition. We have noticed this conflict under section 28 (7).

There is a difference of opinion as to whether the amendment has retrospective effect. It has been held by a Full Bench of the Madras High Court that the amendment made by section 6, Act X of 1930, has a retrospective effect and a transfer of property of the description given in section 53 made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication, can be annulled by the Court under section 53 at the instance of the official receiver (4). The ground of the decision is that the amendment simply declares the old law and does not introduce any alteration in the law as it stood before the amendment. The Madras view has been followed by the Oudh Chief Court (5). A different view has been taken by the Peshawar J. C.'s Court. It has held that, so far as the N.-W. F. Province is concerned, the law prior to the amendment was that the period of limitation was to be considered from the date of adjudication; and the amendment can therefore only affect transactions which came into existence after it and the transactions before the date of amendment and over two years old on the date of the adjudication order are not within the section (6).

(1) *U. Pan Nya v. U. Tint*, A. I. R. 1936 Rang. 498 : 166 I. C. 116.

(2) *Ma Htwe v. Maung Pu*, A. I. R. 1937 Rang. 27.

(3) *U. Ba Saing v. Ma Shmie*, A. I. R. 1936 Rang. 506 : 166 I. C. 90.

(4) *Pichamma v. Official Receiver of Cuddapah*, A. I. R. 1930 Mad. 834.

(5) *Abdul Hafiz v. Mool Chand*, 188 I. C. 711 : 7 Luck. 713 : A. I. R. 1932 Oudh 267, on appeal from *Abdul Hafiz v. Mool Chand*, reported in 7 Luck. 403 : 135 I. C. 383 : A. I. R. 1932 Oudh. 77 (1).

(6) *Joda Ram v. Faizullah Khan*, A. I. R. 1934 Pesh. 30 : 150 I. C. 308.

53. The section requires that the transferor must have been adjudged insolvent. Unless a person is adjudged insolvent the insolvency court has no jurisdiction to decide whether a transfer of property made by him should be annulled as fraudulent and void (1). Where soon after the dismissal of an application by the receiver to set aside a transfer under section 53 or 54, the adjudication is annulled, there is no existing insolvency upon which an order in favour of the receiver or the scheduled creditors as such, can be based. The receiver ceases to exist and hence no appeal is competent by a receiver or a creditor from an order of dismissal (2). For a full discussion on the proposition as to when and under what circumstances and conditions a receiver can continue to prosecute an application under sections 53 and 54 filed before the annulment of adjudication, see commentary under section 37. It is, however, settled that the receiver is not competent under any circumstances to make a new application under these sections after the annulment of adjudication.

Though the stage at which the application should be made is only when the transferor has been adjudged insolvent and his property has vested in the official receiver, the transfers which are contemplated by the section should have taken place before the presentation of the petition (3).

Voidable against the receiver.—In the old section of Act III of 1907 there was the word 'void' instead of 'voidable'. Still it has always been held both in England and in India that the word 'void' means voidable (4). The settlement is avoided not from its date but only from the accrual of the trustee's title, and consequently any one who claims under the settlement as a purchaser for valuable consideration without notice has a good title as against the trustee in bankruptcy (5). And a vendor claiming under a voluntary settlement has a title which he can force on a purchaser (5). In India it has been held that it is only the official receiver or the creditors in the course of insolvency who can get the transaction set aside. A purchaser from the official receiver has not got any such right. Thus in a suit by the alienee of an insolvent for a declaration of title to the property against a purchaser of the same property from the receiver in insolvency, it is not open to the purchaser to raise the defence that the transaction is void under section 36, P. I. A., 1907 (7). Even the receiver has no right against the transferee unless the transfer is set aside by the insolvency court after regular proceedings taken under the section (8).

(1) *Mul Singh v. Lakhmi Devi*, 95 I. C. 1055 : A. I. R. 1927 Lah. 95.

(2) *Bank of Chettinad v. Saw Yon Byan*, A. I. R. 1935 Rang. 498.

(3) See *Hayat v. Bhawani Dass*, A. I. R. 1926 Lah. 146.

(4) *Abdul Kadhar v. Official Assignee of Madras*, 20 I. C. 485 : A. I. R. 1915 Mad. 107 ; *Sankar Narayana Aiyer v. Alagiri Aiyer*, (1919) 49 I. C. 283 : A. I. R. 1919 Mad. 473 ; *Official Receiver of Trichinopoly v. Somasundaram Chettiar*, (1916) 34 I. C. 602 : A. I. R. 1917 Mad. 102 ; A. I. R. 1923 Mad. 1051 : 48 M. 750 : 88 I. C. 934.

(5) *Re Brall*, (1893) 2 Q. B. 381 ; *Re Vansittart*, 10 Mor. 44, approved by the Court of Appeal in *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776.

(6) *Re Carter & Kenderdine's Contract*, 1897, 1 Ch. 776.

(7) *Mariappa Pillai v. Raman Chettiar*, A. I. R. 1919 Mad. 161 : (1919) 42 Mad. 322 : 52 I. C. 519.

(8) *N. N. S. Chetti Firm v. The Bailiff*, District Court, A. I. R. 1925 Rang. 224 : 89 I. C. 61.

S. 53.

May be annulled.—It has been remarked by a Division Bench of the Madras High Court that the insolvency court cannot decline to go into the matter of the nominal and fraudulent nature of an alienation in an application under section 53 (1). The Calcutta High Court has also held that once a transfer of an insolvent's property is found to be void under the section, the property comprised in that transfer is liable to be distributed among the general body of creditors and that the court has no choice in the matter to say that a particular property shall not be so distributed (2). In a Rangoon case it was, however, held that, on an application to avoid transfers, the court is not bound to annul all transactions made by the insolvent which come within the purview of section 53 (3). In none of the cases cited there was a reference to the words 'may be annulled.' In section 54, the words used are "shall be annulled." It appears that the words used in the two sections, though somewhat different, bear the same meaning. It also appears to be reasonably clear that the settlement or transfer is only avoided so far as is necessary to satisfy the debts of the bankrupt and pay the costs of the bankruptcy, and that the title to the surplus, if any, of the separate property is unaffected (4). If we, therefore, assume the unusual case where the creditor's debts can be paid in full out of the insolvent's estate without there being any necessity for avoiding a transfer under section 53, it is submitted that, in that case, the court will not be bound to declare the transaction void under the section.

Exclusive jurisdiction of insolvency court.—There are certain claims arising out of insolvency in which the official receiver has a higher title than the insolvent and he is entitled to impeach transactions which the insolvent himself could not have done, had he not been adjudged insolvent. Voluntary transfers and transfers by way of fraudulent preference belong to this class of claims. Under the English law, the jurisdiction of the court of bankruptcy is not exclusive, and where complicated questions of title are involved or the amount at stake is a large one, the court may leave the matter to be tried by the ordinary tribunals.

In India, however, the view has been taken that questions of title arising under sections 53 and 54 fall within the exclusive jurisdiction of the insolvency court (5). The word 'Court' in sections 36 and 37, P. I. A.,

(1) *Chowdappa v. Katha Perumal*, 96 I. C. 944 : 49 Mad. 794 : A. I. R. 1926 Mad. 801.

(2) *Bhut Nath v. Biraj Mohini*, 49 I. C. 87 : A. I. R. 1919 Cal. 192.

(3) *Y Po Shein v. Maung Ngwe Hlaing*, A. I. R. 1935 Rang. 433.

(4) *Re Sims*, 3 Maus 340 ; *Official Receiver of Coimbatore v. Palaniswami Chetty*, A. I. R. 1925 Mad. 1051 : 48 Mad. 750 : 18 I. C. 934.

(5) *Mariappa Pillai v. Raman Chettiar*, A. I. R. 1919 Mad. 161 : (1919) 42, Mad. 522 : 52 I. C. 519 ; *Kaniz Fatima v. Narain Singh*, 49 All. 71 : 98 I. C. 1001 : A. I. R. 1927 All. 66 ; *Official Receiver of Coimbatore v. Palani Swami Chetty*, 88 I. C. 934 : 48 Mad. 750 : A. I. R. 1925 Mad. 1051 ; *Sahazada Begum v. Gokal Chand Ray*, 105 I. C. 50 : 2 Luck 651 : A. I. R. 1927 Oudh 357 ; *Sharaf-ur-Zaman v. Sir Henry Stenyors*, 70 I. C. 253 : A. I. R. 1923 Oudh 80 ; *Allah Bakhsh v. Karim Bakhsh*, 69 I. C. 752 : A. I. R. 1928 Lah. 214 ; *Hriday Krishna Adva v. Osman Ali Mandan*, A. I. R. 1932 Cal. 151 : 58 Cal. 1352 : 136 I. C. 143 ; a contrary view is taken in *Nathu Ram Gopal Mantri, In re*, 141 I. C. 664 : A. I. R. 1932 Bom. 566, a case under the Presidency-towns Insolvency Act.

53. 1907, (sections 53 and 54, P. I. A., 1920) signifies the court exercising jurisdiction under the Act. A special statutory provision, whereby District Courts and certain other courts are invested by notification of the Local Government under section 3 (1) P. I. A., 1907, with the power among other powers of invalidating certain defined transactions of insolvents, should not be extended to all courts of original jurisdiction, whether notified under the Act or not; otherwise conflicts might arise between the decision of the court sitting in insolvency and the judgment of another court exercising ordinary original jurisdiction (1). The fact that an order under the section is made subject to an appeal shows that the legislature intended the decision of the insolvency court to be final, not liable to be challenged in a separate suit in the ordinary courts (2). The contrary view which was taken in *Gandla Vecrama v. Rama Swamiah Garu* (3), and *Duni Chand v. Mohd. Hassan* (4) must now be considered as bad law. Following the view that the matters arising under sections 53 and 54 fall within the exclusive jurisdiction of the insolvency court, it has been held that the civil court has no jurisdiction to try the suit, such a suit being impliedly barred within the meaning of section 9 of the Code of Civil Procedure, 1908 (5). It makes no difference that the party suing is the transferee or the official receiver or assignee. In other words, the plea based on the sections can neither be taken as a ground of attack by the plaintiff nor a ground of defence by the defendant in the ordinary courts (6).

A secured creditor generally stands outside the bankruptcy. It may be that the mortgage might also be liable to be challenged under section 53 or 54. The proper course in cases where a civil suit is pending on a mortgage and where the official receiver applies to the insolvency court for a declaration that the mortgage is bad under section 53 would be to have the proceedings in the suit stayed till the disposal of the application by the insolvency court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under section 53. The order of the insolvency court under section 53 would be binding upon the parties, and the ordinary civil court therefore would not be able to execute the mortgage-decree passed by it. The application must be made either to the court in which the civil suit is pending or to a court which has power to stay the proceedings in that suit. There is no warrant either in law or in practice for the contention that the presentation of an application to the insolvency court for an order under section 53 takes away the jurisdiction of the civil court to proceed with the suit of a

(1) *Mariappa Pillai v. Raman Chettiar*, A. I. R. 1919 Mad. 161 : 42 Mad. 322 : 52 I. C. 519.

(2) *Allah Bakhsh v. Karim Bakhsh*, 69 I. C. 752 : A. I. R. 1922 Lah. 214.

(3) Second Appeal No. 360 of 1916, cited in A. I. R. 1919 Mad. 161 : 52 I. C. 519 : 42 Mad. 322.

(4) 22 P. R. 1917 : 40 I. C. 220 (overruled in *Allah Bakhsh v. Karim Bakhsh supra*.)

(5) *Shahzada Begum v. Gokal Chandra*, 2 Luck. 651 : 105 I. C. 50 : A. I. R. 1927 Oudh 357.

(6) *Mariappa Pillai v. Raman Chettiar*, 1919, 42 Mad. 322 : 52 I. C. 519 : A. I. R. 1919 Mad. 161 ; *Mohandas Thakurdas v. Tikam das Hotchand*, A. I. R. 1917 Sind 20 : 37 I. C. 250; see also *Willmott v. London Celluloid Co.*, 1886, 31 Ch. D. 425 : 55 L. J. Ch. 449 and the same case in appeal reported as 1887, 34 Ch. D. 137 : 56 L. J. Ch. 89. (The Sind ruling is on section 213, Companies Act, 1882).

secured creditor. It does not follow that because the transaction is void under section 53, the mortgagee has no remedy against the mortgagor. The transaction under section 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors is an exclusive jurisdiction of the insolvency court ; but that does not take away the jurisdiction of the civil court to proceed with the mortgagee's suit to decree (1). The order of the insolvency court to the effect that a particular transfer of property is fraudulent binds the parties to those proceedings and the same plea cannot be retried either in a suit or by way of defence (2). As already noted, the receiver in moving the insolvency court to annul a sale acts on behalf of the general body of creditors. The fact that a creditor of the insolvent has unsuccessfully opposed the transferee's suit brought under O. 21, r 63, C.P.C, cannot operate as *res judicata* against the receiver and not even against the same creditor, as the latter acting under the section acts in a representative capacity (3). Even where an order of adjudication is based on the basis of a fraudulent preference, the official receiver is at liberty to show that the transfer is void under section 53 (4). Similarly the dismissal of an application under section 53 does not bar a subsequent application under section 54, under section 11, explanation 4, C. P. C, particularly where the official receiver is not proved to be aware of the ground for his second application when the first application was presented (5).

Proceedings under sections 53 and 54; their nature and procedure.—The proceedings under the sections are not of a summary nature. The jurisdiction of the insolvency court is exclusive and the civil courts have no hand in the matter. There is an appeal provided from an order passed under the sections and the order is final and has the effect of debarring the parties to the proceedings from reagitating the matter anywhere else. Such an application should be tried practically as if it were an action (6). There should be a formal application by the receiver containing all the details which are entered in a plaint in an ordinary suit ; the grounds on which the transfer is challenged should be clearly set forth in the application, the transferee should put in a written reply and then the proceedings should continue very much as in a suit (7). The case should be opened on behalf of the official assignee and his report read at any rate as if it were a pleading (8). The absence of a formal application shall, however, be not a ground for quashing the proceedings where all the

(1) Official Receiver of Coimbatore *v.* Palani Swami Chetty, 88 I. C. 934 : 48 Mad. 750 ; A. I. R. 1925 Mad. 1051.

(2) Narayan. *v.* Hardatta Rai, A. I. R. 1920 Nag. 97 : 57 I. C. 612, (under section 41, Indian Evidence Act ; Allahbakhsh *v.* Karim Bakhsh, 69 I. C. 752 : A. I. R. 1922 Lah. 214.

(3) Rangammal *v.* Varadappa Naidu, A. I. R. 1935 Mad. 670 : 158 I. C. 175.

(4) M H tve *v.* Maing Pu, A. I. R. 1937 Rang. 27.

(5) Mangal das *v.* Official Receiver, A. I. R. 1937 Lah. 668.

(6) Samupattar *v.* Official Assignee, 73 I. C. 532 : A. I. R. 1924 Mad. 180.

(7) Chunno Lal *v.* Lachman Sonar, 39 All. 391 : 42 I. C. 941 ; A. I. R. 1917 All. 12.

(8) Samupattar *v.* Official Assignee *supra*.

- . 53. parties have had notice and the evidence had been fully gone into (1). Nor is it illegal, though certainly irregular, for the insolvency court to try the insolvency petition as well as the proceedings for annulling the transfer and passing an order first annulling the transfer and then adjudicating the debtor insolvent (2). Where the alienations are the outcome of a general scheme of fraud and conspiracy between the insolvent and the alienees, they can be attacked by the receiver in one application (3).

Transferee a necessary party.—The transferee, the transfer in whose favour is sought to be impeached under these sections is a necessary party to the proceedings. He should be given full notice not only that the transfer in his favour is being challenged but also of the grounds upon which it is challenged and a proper opportunity should be given to him for defending his position and putting his case before the court (4). An opportunity for producing evidence to the parties should be given. The court should not be merely satisfied by a mere perusal of the document impeached and hearing arguments (5).

The insolvency court itself should hear the application.—It is the duty of the insolvency court to try an application under sections 53 and 54 ; it should not leave the duty of such an inquiry to the official receiver (6). The official receiver is a party to the proceedings and it is against him that the instrument is sought to be declared void. To delegate the powers under the section to him would be in effect to make the official receiver a judge in his own case (7). The official receiver is a mere executive officer and he is not entitled to take evidence in an inquiry under section 53, though ordered by the district judge (8). The insolvency court has also no jurisdiction to refer the matter to a subordinate court for deciding as to whether action should be taken to have the alienation set aside or not (9) nor it can send the case for inquiry to it (10).

Receiver's report is not evidence under the section.—In trying an application under sections 53 and 54 the report of the receiver or the statements recorded by him are inadmissible in evidence (11). When-

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- (1) *Panmal Jesraj v. Mr. J. Macleod*, A. I. R. 1935 Cal. 190.
 (2) *Harnam singh v. Gopal Das Desraj*, 109 I. C. 270 : A. I. R. 1929 Lah. 79.
 (3) *Official Assignee v. Krishna Swami Naidu*, A. I. R. 1937 Mad. 192.
 (4) *Jugalpada Dutt v. Ganesh Chandra Pal*, 44 I. C. 168 : A. I. R. 1919 Cal. 507 ; *Upendra Mohan v. Brindaban*, 33 I. C. 188 : A. I. R. 1917 Mad. 571 ; *Kauleshar Ram v. Bhawan Prasad*, 42 I. C. 845 : A. I. R. 1917 All. 15 ; *Girdharilal v. Sarab Kishan*, 138 P. W. R. 1918 : 46 I. C. 657 : A. I. R. 1918 Lah. 35 ; *Kunj Behari Lal v. Madhusudan Lal*, A. I. R. 1919 All. 348 : 50 I. C. 117.
 (5) *Abdul Aziz v. Khirud Chandra Das*, 41 I. C. 411 : A. I. R. 1918 Cal. 796.
 (6) *Simi Rowther v. Kumarappa Chetty*, 35 I. C. 875 : A. I. R. 1917 Mad. 858.
 (7) *Muthu Swami Chettiar v. Official Receiver, North Arcot*, 97 I. C. 407 : A. I. R. 1926 Mad. 210.
 (8) *Venkatarama Chetty v. Angathay Ammal*, 146 I. C. 204 : A. I. R. 1932 Mad. 471.
 (9) *Jagannath v. Lachhmandas*, 36 All. 549 : 26 I. C. 32 : A. I. R. 1914 All. 312.
 (10) *Upendra Mohan v. Brindaban*, 33 I. C. 188 : A. I. R. 1917 Mad. 671.
 (11) *Chinna Meera Rowther v. Kumara Chakrawarthi Iyengar*, 36 I. C. 906 : A. I. R. 1917 Mad. 838 ; *Basanti Bui v. Nanhemal*, 89 I. C. 357 : 47 All. 864 : A. I. R. 1926 All. 29.

ever it was intended by the legislature that the report of an official receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter. The absence of such a provision in these sections impliedly means that the receiver's report is not legal evidence (1). The omission by a party to object to the admissibility of the statements recorded by the official receiver will not, in the absence of a deliberate consent or waiver of objection, cure the defect (2).

S. 53.

Limitation for an application under sections 53 and 54.—So long as the insolvency proceedings are pending the official receiver can move the court for action at any time he may like. Article 181, Indian Limitation Act, has no application to such applications, as it is merely confined to applications under the Code of Civil Procedure (3). Even if article 181 of the Limitation Act applies to such an application, opinion has been expressed that the starting point for limitation under the article would be the date on which the debtor was adjudicated insolvent. The case was under the Act 3 of 1907 and it was not necessary to decide this point because the learned judge was already of opinion that the article did not apply (4).

Rights of transferees whose transfers are avoided under the sections.—When a transfer by way of sale by the insolvent is annulled as fraudulent under section 53 but it is found that the alienee paid a sum of money towards the satisfaction of a prior decretal amount, the alienee may be allowed to prove in insolvency as an unsecured creditor to the extent of the prior debt discharged by him (5). Where the prior debt is a mortgage debt and is redeemed by the vendee of a sale, which is set aside under this section, he has a right to be entered as a scheduled creditor to the extent of the redemption amount (6). In such a case a transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank as a scheduled creditor to the extent of its payment (7). In a case, within two years of his application for insolvency the insolvent had made a transfer in favour of his wife ostensibly for rupees twenty-five thousand in lieu of her dower debt. The receiver applied to have the transfer set aside and in the course of those proceedings it was held that the dower debt of rupees twenty-five thousand was not proved. The wife then applied to be entered in the schedule of creditors claiming rupees twenty-five thousand as her dower debt. It was held that it was not open to her to prove that her dower was rupees twenty-five thousand but

(1) *Basanti Bai v. Nanhemal supra.*

(2) *Chinna Meera Rowther v. Kumar Chakarvarthi Iyengar*, 36 I. C. 906; A. I. R. 1917 Mad. 838.

(3) *Rama Swami v. Subramania Aiyar*, 79 I. C. 443 : A. I. R. 1925 Mad. 172 ; *Daryai Singh v. Kunjlal*, 75 I. C. 995 : A. I. R. 1924 Lah. 553 ; *Duraya Solagan v. Venkataram Naicker*, 16 I. C. 123 : A. I. R. 1920 Mad. 974 ; *Pirthinath v. Basheshar Nath*, 69 I. C. 403 : A. I. R. 1924 Lah. 331.

(4) *Nikkamal v. Marwar Bank, Ltd., Lahore*, 52 I. C. 188 : A. I. R. 1920 Lah. 470.

(5) *Amirchand v. Manoharlal*, 141 I. C. 336 : A. I. R. 1933 Lah. 211 ; *Devi Dayal v. Sundardas*, 51 I. C. 720 : A. I. R. 1919 Lah. 211.

(6) *Ram Prasad v. Seth Jaskaran*, 82 I. C. 489 : A. I. R. 1925 Nag. 73.

(7) *Rama Swami Aiyangar v. Official Receiver, Coimbatore*, 94 I. C. 535 : A. I. R. 1926 Mad. 672 ; *Palamalai Mulaliar v. Gopalasami Aiyar*, A. I. R. 1924 Mad. 450 ; 8) I. C. 147 ; *Palamalai Pillai v. The South Indian Export Company*, 33 Mad. 334 : 5 I. C. 33.

53. it was open to her to prove the true amount due to her (1). A transfer that may be deemed void under section 54 is not necessarily void *ab initio*. It is void only as against the receiver, while remaining valid as between the parties to the transaction. The transfer is, therefore, valid until set aside, and the transferee being in lawful possession is not liable for *mesne* profits of the property (2).

Set-off.—If money has been settled under a voluntary settlement which is avoided, the beneficiary cannot set off a debt due from the settlor to the beneficiary against the amount payable to the trustee in bankruptcy. Thus where a payment of £ 250 by a bankrupt to his wife before bankruptcy was declared void against the trustee in bankruptcy as a voluntary settlement, and the trustee sued the wife to recover that sum, it was held that the wife could not set off a debt due to her from the bankrupt at the date of the bankruptcy against the sum of £ 250, that set-off in bankruptcy is allowed only in the case of mutual debts and the sum settled was not a debt due by the wife to the bankrupt (3).

Administration of deceased's estate—When a debtor against whom a petition in insolvency has been presented dies before adjudication, the proceedings are continued under section 17, and the court passes an order that the estate of the debtor should thereby be adjudged as insolvent and an official receiver is appointed to administer it, the official receiver or a creditor can invoke the powers of the court to set aside settlements and alienations voidable under sections 53 and 54. The order of adjudication, though passed against the estate of the deceased, is against the deceased himself and transfers by him are liable to be set aside under sections 53 and 54 (4).

Transfers in favour of a creditor may fall within the section.—Transfers in favour of creditors within three months of the transferor's insolvency are generally impeached under section 54. It, however, does not mean that a transfer in favour of a creditor is, by virtue of the specific provision of section 54, is taken out of the reach of section 53. Section 54 deals with a fraudulent preference by the debtor himself and the question for consideration of the court is as to his dominant motive only. Under section 53, the law requires that, whatever the dominant motive of the transferor be, if the transferee himself had acted in good faith, he is protected. The general words in section 53 declaring all transfers void, subject to certain exceptions, cannot, therefore, be controlled by the specific mention of certain transfers which are declared void by section 54 (5). It has, therefore, been held that a transfer to a creditor may be dealt with under section 53 of the Act (6). In the undermentioned cases (7) the transfers were in favour of creditors and were annulled under section 53 of the

(1) *Umra Begum v. Ahmed Alikhan*, 20 I. C. 641 : 11 A. L. J. 614.

(2) *Balkrishna-Sakharam v. Digambar Das*, A. I. R. 1936 Nag. 139.

(3) *Lister v. Hooson*, (1908) 1 K. B. 174.

(4) *Subbiah Ayar v. Official Receiver, Tinnevely*, A. I. R. 1933 Mad. 25 : 141 I. C. 822.

(5) *Re Naraindas Sundardas*, A. I. R. 1926 Sind 133 : 93 I. C. 931.

(6) *Bhagatram Bindrabai v. Puran Chand*, 140 I. C. 598 : A. I. R. 1933 Lah. 43; *Muthiah Chettiar v. Official Receiver of Tinnevely District*, 141 I. C. 101 : A. I. R. 1933 Mad. 185 ; *Venkanna v. Official Receiver, Rajahmundry*, A. I. R. 1935 Mad. 259.

(7) *Official Assignee, Bengal v. Yokohama Specie Bank*, A. I. R. 1925 Cal. 640 : 87 I. C. 329 ; *Official Assignee, Mad. v. Sheikh Moheedin Rowther*, A. I. R. 1927 Mad. 1013 : 103 I. C. 61 : 50 Mad. 948 ; *Official Assignee, Mad. v. Abdul Razak Sahib*, 29 I. C. 204 : A. I. R. 1916 Mad. 402.

Act or under the corresponding section of the Presidency-towns Insolvency Act, though the principle was not in terms stated. **S. 5.**

In considering the question of good faith under section 53, in case of a transfer in favour of a creditor, that element, which relates to fraudulent preference, must be eliminated, that is to say, the knowledge, for instance, on the part of the transferee creditor that the other creditors are being defrauded does not itself constitute bad faith (1).

Appeal.—A first appeal always lies from a decision under sections 53 and 54. Where the order is made in the exercise of insolvency jurisdiction by a court subordinate to a district court, an appeal lies to the district court. Where the order is passed by the district court otherwise than in appeal from an order made by a subordinate court, an appeal lies to the High Court. *Vide* section 75, sub-section (2).

A second appeal to the High Court from the order of the district court passed on appeal from an order made in the exercise of insolvency jurisdiction by a court subordinate to the district court has, however, been held not to lie (2). The reasons given in support of the view are that an annulment of a transfer of property by an insolvency court acting under the powers conferred by section 53 does not constitute a decision under section 4. The power given by section 4 is expressly stated to be subject to the provisions of the Act. If the other provisions of the Act authorise the determination of any questions raised, the power given by section 4 is not invoked and no decision is given under that section. Schedule 1 of the Act clearly shows that the legislature has drawn a distinction between orders under section 4 and orders under sections 53 and 54. If section 4 is to be construed in a very wide sense, it would embrace every order of the insolvency court—a view which cannot be supported on any reasonable ground.

Revision.—A revision is competent from an order of the district court passed on appeal from a subordinate court exercising insolvency jurisdiction. *Vide* section 75, subsection (2) proviso no. 1. The revisional powers of the High Court are not in any way limited by express words. It will interfere only where it is not satisfied that the district court's order was according to law. An error of law as to burden of proof has been held to be a good ground for revision, particularly so where the law in regard to onus has affected the trial judge in weighing the evidence evenly (3). The High Court will not however interfere on a mere question of fact (4).

Who can appeal—Where the decision is made by a court subordinate to a district court, an appeal may be taken to the district court by the debtor, any creditor or the receiver or any other person aggrieved by such order. Where the order is passed by the district court it is provided by

(1) Venkanna v. Official Receiver, Rajahmundry *supra*.

(2) Ramchandra v. Ramchandra, 134 I. C. 87 : A. I. R. 1931 Nag. 153 F. B.; Alagiri Subba Naick v. Official Receiver, Tinnevely, 54 Mad. 989 : 132 I. C. 641 : A. I. R. 1931 Mad. 745; Chetram v. Atma Ram, 146 I. C. 490 : A. I. R. 1934 Lah. 634; Ramaswami v. Venkataswami, 145 I. C. 876 : A. I. R. 1933 Mad. 653; Jiwanram v. Venkataswami, 145 I. C. 876 : A. I. R. 1933 Mad. 653; Jiwanram v. Official Receiver, A. I. R. 1935 Lah. 708; Pandurang v. Nandlal, 125 I. C. 683 : A. I. R. 1930 Nag. 272; Muthiah Chettiar v. Official Receiver Tinnevely, A. I. R. 1933 Mad. 185; 141 I. C. 101 (so assumed, point conceded); Tarachand v. Balkishan, 33 P. L. R. 971.

(3) Chidamabaram Pillai v. Subramania Ayyar, 140 I. C. 674 : A. I. R. 1932 Mad. 513.

(4) Jiwan Ram v. Official Receiver, A. I. R. 1935 Lah. 708.

- 1. 53.** section 75, sub-section (2) that any person aggrieved by the order may appeal to the High Court. A person who claims to be the transferee of the property for valuable consideration and alleges that he has acquired title in good faith is clearly an aggrieved person within the meaning of sub-section (2) of S. 46, P. I. A., 1907 (S. 75, sub-section (2), P. I. A., 1920) (1).

To an appeal by the transferee the receiver is a necessary and a proper party (2). Where the official receiver has made an application under sections 53 and 54, he, as representing the general body of creditors, is certainly an aggrieved person and has a right of appeal. Where the application is made by any creditor under section 54 (a), such creditor also has a right of appeal. Where the application is made by the receiver, any creditor may appeal from such an order. He is an aggrieved person because the dividends will be diminished if the alienation is allowed to stand (3).

Transfers not coming within the section.—In order that the section may apply it is necessary that the transfer must have taken place within two years of the presentation of the petition. Thus transfers which took place more than two years before the date of the presentation of the petition do not fall under the section. Again, there may be a transfer which may not be within the section, yet it may be fraudulent under section 53, Transfer of Property Act, or under the general law, being contrary to the spirit and policy of bankruptcy laws. Again, the section contemplates those cases where the transfer, when originally made, was a good transfer of property though it was subject to an action for avoiding it to be brought by the receiver. Such a transfer remains good so long as it is not annulled by the court. A transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the court has to do in such a case is to declare that it is void, as if it were by an ordinary civil court (4). Still again the transferee from the insolvent might have transferred the property to a third person before the date of the presentation of the petition, though his own transfer might be impeachable under sections 53 or 54. Such subsequent transfers do not, strictly speaking, fall within the section.

From the above it follows that the following kinds of transfers do not fall within this section :—

(i) Transfers which do pass property in the transferred property to the transferee and which took place more than two years before the date of the presentation of the petition.

(ii) Transfers which are fictitious and void from their very inception and the transferees did not get any title under the transfers ;

(iii) Transfers in favour of third persons by transferees from the insolvent under transfers which are voidable against the receiver under section 53 or 54 ;

(1) *Lalji Sahay Singh v. Abdul Gani*, 7 I. C. 765 : 12 C. L. J. 452.

(2) *Lalji Sahay Singh v. Abdul Gani*, 7 I. C. 765 : 12 C. L. J. 452.

(3) *Kumarappa Chettiar v. Murugappa Chettiar*, 36 I. C. 771 : A. I. R. 1917 Mad. 411 ; *Ananthanarayan Aiyar v. Rama Subba Ayyar*, A. I. R. 1924 Mad. 346 : 79 I. C. 395 : 47 Mad. 673 ; *Barkat Rai v. Jewan Mal*, A. I. R. 1934 Lah. 968 (1) : 154 I. C. 708.

(4) *Hari Chandra v. Moti Ram*, 94 I. C. 429 : 48 All. 415 : A. I. R. 1926 All. 470, per Justice Suleman.

(iv) Transfers by the insolvent of his property which take place before the order of adjudication but after the presentation of the petition. **S. 53.**

We shall consider each class of these transfers and the remedy of the official receiver in regard to them.

Real transfers more than two years old.—Such transfers cannot be avoided under section 53. They however may be avoided under section 53, Transfer of Property Act or under general law. The difference between a case under section 53, Transfer of property Act and a case under section 53, Provincial Insolvency Act, is that under the former section it is necessary to establish intent to defeat or delay creditors, whereas under the latter proof of such intent is not necessary (1). Again, in order that a case may come under section 53, Transfer of Property Act, the transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid. So soon as it is found that the transfer is made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to another creditor (2). Where a transfer falls within the ambit of section 53, Transfer of Property Act, it is open to a creditor or the official receiver to impeach it on that ground by the institution of a regular suit. S. 53, P. I. A., is no bar to it (3). The receiver may also apply to the insolvency court by an application under section 4 for avoiding a transfer voidable under S. 53, T. P. A. The insolvency court has jurisdiction to decide all questions of title based on general law, arising out of insolvency proceedings (4). In exercising jurisdiction under section 4 for avoiding a transfer under S. 53, T. P. A., the court should act in the same manner as in an ordinary suit (5).

Fictitious or benami transfers.—In the case of fictitious and benami transfers the real owner is the insolvent. The transfer is merely a cloak for hiding the real ownership of the property with the intention of removing it from the grasp of creditors. Such transfers can be impeached by a regular suit by the receiver as representing the creditors or by any creditor. They may also be impeached by an application under S. 4, P. I. A., and declared void by the insolvency court (6). Where the insolvent, just before apply-

(1) *Muhammad Habibullah v. Mushtaq Hussain*, A. I. R. 1917 All. 32.

(2) *Musahar Sahu v. Hakim Lal*, A. I. R. 1915 Privy Council 115.

(3) *Atma Ram v. Dayaram*, 115 I. C. 330 : A. I. R. 1929 Sind 94 ; *Official Receiver of South Kanara v. Bastiao Souza*, 95 I. C. 300 : A. I. R. 1926 Mad. 826 ; also see *Sayyad Mohammad v. Mohamad Ismailkhan*, 104 I. C. 822 : A. I. R. 1927 Cal. 766.

(4) *Sikri Parshad v. Aziz Ali*, 41 All. 71 : A. I. R. 1922 All. 196 ; *The Oudh case, Hinga Lal v. Jawahir Prasad*, 114 I. C. 126, does not appear to lay down correct law.

(5) *Atma Ram v. Dayaram supra*.

(6) *Sobharam v. Waryamsingh*, A. I. R. 1921 Lah. 288 ; *Maidaram v. Jagannath*, 123 I. C. 539 : A. I. R. 1930 Lah. 180 ; *Jahanwar Sultan v. Safdar Alikhan*, 142 I. C. 97 : A. I. R. 1933 Pesh. 46 ; *Official Receiver v. Sagiraju Subbayya*, 146 I. C. 530 (2) : A. I. R. 1933 Mad. 527 ; *Abdul Hassan Khan v. Ragbir Prasad*, 131 I. C. 433 : A. I. R. 1931 Oudh 124 ; *Harichandrai v. Motiram*, 94 I. C. 429 : 48 All. 414 : A. I. R. 1926 All. 470 ; *Mst. Sanjirat v. Ranchandar*, 143 I. C. 630 : A. I. R. 1933 Lah. 597 (1).

- S. 58.** ing for insolvency, purchased some property in the name of another, and on evidence it was established that the sale was fraudulent and the real purchaser was the insolvent, it was held that the sale deed evidencing such sale could be set aside, though not covered by section 53 (1). For a fuller discussion on the jurisdiction of the insolvency court in the matter of annulling transfers and determining questions of title against strangers see commentary under section 4

(iii) **Transfers by transferee of insolvent** — The plain meaning of the section is that it contemplates only the transfer of property by the insolvent in favour of another person. The use of the word transferor for the person who is adjudged insolvent clearly indicates that the transfer should have been made by the insolvent and that it does not include transfers by the transferee of the insolvent himself. Accordingly it has been held that under section 53 the official receiver is not at liberty to attack such a transfer (2). This view will, however, not apply where the later transfers are also linked together with the first transfer as one transaction (3), nor where the second transfer is only a colourable transaction and the debtor's transferee is only a benamidar for his subsequent transferee (4). The fact that a transfer by the transferee of the insolvent cannot be impeached under section 53 does not make it futile to declare the transfer by the insolvent as void because it cannot be said that the second transfer cannot be impeached at all (5). Where there has been a second transfer and the receiver is aware of the transfer, the dispute is really between the receiver on the one hand and the subsequent transferee on the other hand, and not between the receiver and the first transferee, who has no longer got any interest in the property left. An order obtained by the official receiver in proceedings to which the first transferee only is a party will not bind the second transferee. In order to bind the second transferee it is necessary that he should have been made a party (6). Dissenting from the Allahabad view, the Rangoon High Court has held that the decision of the insolvency court under section 4 is a judgment in rem and it binds all, whether they were party to the proceedings or not (7). It is submitted, with respect, that the Allahabad view is correct.

In the Act III of 1907, there was section 36 corresponding to section 53 of the present Act but there was no corresponding section to section 4 of the present Act. Under the old Act there was a difference of opinion as to whether the insolvency court had jurisdiction to decide the claims of third parties. Transfers from transferees of the insolvent could

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- (1) *O. M. Chiene v Kishan Parshad*, A. I. R. 1935 All. 982.
 (2) *Sudha v. Firm Nanakchand-Daulatram*, A. I. R. 1925 Lah. 295 : 88 I. C. 89 ; *Hayat Muhammad v. Bhawnidas*, 90 I. C. 1037 : A. I. R. 1926 Lah. 146 ; *Ponnamai Ammal v. District Official Receiver, Tinnevely*, A. I. R. 1927 Mad. 58, 97 I. C. 918.
 (3) *Pullyya v. Official Receiver of Krishna*, 143 I. C. 372 : A. I. R. 1933 Mad. 271 ; *Isamboddin-Ajmoddin v. Ajmoddin Shamsoddin*, A. I. R. 1936 Bom. 776.
 (4) *Jagannath Aiyangar v. Narayan Aiyangar*, 52 I. C. 761 : A. I. R. 1920 Madras 917.
 (5) *Govind v Suba*, 121 I. C. 663 : A. I. R. 1930 Nag. 84.
 (6) *Amir Ahmad v. Syed Hasan*, 57 All. 900 : 155 I. C. 684 : A. I. R. 1935 All. 671.
 (7) *Hla Guaw U v. U Tun Qyaw San*, A. I. R. 1937 Rang. 369.

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not be challenged under S. 36, P. I. A. 1907, and according to one view it could not be challenged under any other provision of the Act in the insolvency court. Of course it could be challenged in the ordinary courts. The view was therefore, expressed that the proper course for the insolvency court was first to declare the first transfer void under S. 36, P. I. A., 1907, and then to direct the receiver to get the subsequent transfers set aside by a separate suit in the ordinary courts. Under the present Act section 4 has been interpreted so as to confer a very wide and almost unlimited jurisdiction on the insolvency court to decide questions of title even where strangers to the insolvency are concerned. Now, the view has been taken that, though section 53 may not apply, subsequent transfers can be annulled under section 4 of the Act. And the proper course for the official receiver is to make all the subsequent transferees parties to the proceedings in an application under section 53 or section 54 thereby enabling the court to decide the matter finally (1). The matter has been put thus in the Madras case last cited: "Generally it is incompetent for the court in proceedings under section 53 to inquire into the validity of transfers by transferees from insolvents. But in proceedings properly framed under that section, it may be convenient and sometimes necessary to have the parties before the court whose interests will necessarily be affected by the decision. It would indeed be extremely inconvenient and expensive if, when transfers are sought to be avoided under sections 53 to 55, transferees from those transferees, even though such transfers were subsequent to the petition or to the order of adjudication, could maintain that they should not be impleaded and that the receiver should proceed against them by a separate suit. Such a rule will make proceedings in insolvency practically interminable and still more ineffective than they already are. The power under section 4 to decide all questions arising in insolvency is undoubted and it is only a matter of discretion whether the procedure under the Act should be adopted or a suit be directed."

So far we have dealt with the powers of the insolvency court and the procedure to be adopted in regard to transfers by a transferee of the insolvent. Now we come to the rights of such a transferee, *i. e.* a transferee from a person who derives title from a voluntary transfer voidable under the section.

As already noted, the word voidable in the section means voidable, the settlement being avoided not from its date, but only from the accrual of the trustee's title, and consequently any one who claims under the settlement as a purchaser for valuable consideration without notice has a good title as against the trustee in bankruptcy (2). The mere fact that the purchaser has notice that the person through whom he

(1) *Atta Mohammed v. Mehar Chand*, A. I. R. 1935 Lah. 368, *Devi Das v. Manohar Lall*, A. I. R. 1937 Lah. 323. (The Lahore rulings are correct so far as they hold that a subsequent transfer may be set aside under section 4, but if they hold that the subsequent transfers must stand and fall with the first transfer in every case and that the subsequent transfer cannot in any case stand, even though the first transfer may be voidable under section 53, it is submitted, with great respect, that they need reconsideration. The question, however, did not directly arise in these cases, as the subsequent transfers were also found to be collusive and fictitious); *Chidambaram Pillai v. Subramania Ayyar*, 140 I. C. 674; A. I. R. 1932 Mad. 513; *Dit Ram Mal v. Hansraj*, 15 Lah. 349; 148 I. C. 1013; A. I. R. 1934 Lah. 101 (2). For other cases see commentary under section 4.

(2) *Re Brall*, 1893, 2 Q. B. 381; *Re Vansittart*, 10 Mor. 44.

S. 53. claims is entitled under a voluntary settlement, if there is no notice of the insolvency of the settlor and the purchase is prior to the bankruptcy, is not sufficient to prevent the purchaser from claiming as a purchaser for value in good faith (1). And the Court of Appeal in England has held on general equitable principles that a purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property against the settlor's trustee in bankruptcy, even though the purchase is subsequent to the act of bankruptcy to which the title of the trustee relates back (2). It has also been held in England that a purchaser, in good faith and without notice, from a donee of property whose title is subsequently declared fraudulent and void under section 172 of the Law of Property Act, 1925 (corresponding to section 53, T. P. A.), gets a good title against the execution creditor or a trustee in bankruptcy (3). Under section 45, B. A, 1914 (corresponding to section 55, P. I. A., 1920) it has been held in England that where, on appeal from the dismissal of the bankruptcy petition, the appeal was allowed, and a receiving order was made and dated as from the order of the court dismissing the petition, for the purposes of that section, the receiving order must operate from the date when it was in fact made, and not from the date it bore (4).

It is submitted that these decisions, decided under the English sections, will be followed in India. From the above decisions two propositions of law can be deduced. Firstly, that in cases of transfers of property avoided under section 53, P. I. A., 1920, the title of the trustee to the property comprised in the transfer so avoided accrues from the date of its avoidance and not from the date on which the transfer actually took place; and the doctrine of relation back has no application to such property. Secondly, that the rights of the second transferee will be determined on general equitable principles.

Where the first transfer is found to be fictitious and void *ab initio* the first proposition will not apply as the property must be deemed to have vested in the official receiver under section 28 (7) from the date of petition for insolvency and the so-called first transferee had no saleable interest subsequent to this and a transfer by him is also void (5) There are, however, certain observations in the judgment just cited which do not appear to be quite accurate in view of the English decisions on the subject. A similar point arose in a Calcutta case (6) There the English cases were considered and distinguished on the ground that they have no application to a case where the first transfer is quite fictitious. Similarly it has been held by the Lahore High Court that where the original transfer is set aside in section 53, the title of

(1) *Re Brall supra*.

(2) *Re Hart*, (1912) 3 K. B. 6; and *Re Gunsbourg*, 1920, 2 K. B. 426.

(3) *Harrods, Ltd. v. Stanton*, (1923) 1 K. B. 516.

(4) *Re Teale*, 1912, 2 K. B. 367, case decided under section 49 of the Act of 1883, which corresponded to section 45 of the Act of 1914.

(5) *Ata Mohammed v. Mehar Chand*, A. I. R. 1935 Lah. 368; see also *Girish Chandra Seal*, in the matter of, A. I. R. 1936 Cal. 212; 1602 I. C. 650.

(6) *In re Govardhan Seal v. Rai Pissori Dasi*, A. I. R. 1916 Cal. 331; 34 I. C. 435.

a pre-emptor of such a sale is not sustainable, as a right of pre-emption is merely one of substitution and not of re-purchase (1). **S. 53.**

Transfers by the insolvent after the presentation of the petition and before the order of adjudication.—The case of such transfers is expressly provided for in section 55 of the Act. See commentary under that section.

Transfer under order of court.—Where an order is made by the court under order 20, rule 11 (2), C. P. C., 1908, directing the judgment-debtor to execute a mortgage of his property to the decree-holder, the subsequent adjudication of the debtor could not affect the rights of the decree-holder to have the mortgage executed in his favour. Such a transaction is not affected by this section or by the fraudulent preference section (2).

Property outside local limits.—It has been held by the High Courts of Calcutta and Madras that the insolvency court has power to deal with transfers made by the debtor of property situate outside the limits of the original civil jurisdiction of the court and that this power is not affected by the provision of section 16 of the Code of Civil Procedure, 1908, or clause (12) of the Letters Patent (3). The court has however no power to annul, under section 36, a transfer of property which is situate in foreign territory and not in British India (4).

Trustee's lien for costs—Trustees of a settlement, originally valid but avoided under this section, are entitled to a lien on the property for expenses properly incurred by them as trustees in the performance of trust duties, as, for instance, in defending the settlement against the settlor (5). If the trustees oppose the claim of the official assignee or receiver to set aside the deed under this section, they will be entitled, even if the deed is set aside, to retain their costs out of the trust fund, provided they have acted properly in the discharge of their duties as trustees and not put the official assignee or receiver to unnecessary expense (6). If, however, they appeal and the appeal is dismissed, they are not entitled to retain the costs of the appeal out of the trust fund (7).

Miscellaneous.—Annulment of alienation under section 53, Insolvency Act, is invariably in pursuance of the order of adjudication. If, therefore, the order of adjudication was made before the notification, the application for annulment of a transfer made by the insolvent would be subject to the Kumaon rules and not to the arrangement introduced by the notification (8).

(1) *Dit Ram Mal v. Hansraj*, 15 Lah. 349 : 148 I. C. 1013 : A. I. R. 1934 Lah. 101 (2).

(2) *Allan Bros. & Co. v. Sheikh Jumma & Sons*, (1924) 2 Rang. 673 : 85 I. C. 291 : A. I. R. 1925 Rang. 189.

(3) *Lalji Sahay v. Abdul Gani*, (1910) 15 Cal. W. N. 253, 257 : 7 I. C. 765 : *Abdul Khader v. The Official Assignee*, A. I. R. 1917 Mad. 832 : 40 Mad. 810 : 36 I. C. 524, affirmed *in re Kancherla Krishna Rao*, 1928, 51 Mad. 540 : 112 I. C. 149 : A. I. R. 1928 Mad. 732.

(4) *Dropdi Bai v. Govind Singh*, 65 I. C. 334 : A. I. R. 1922 Nag. 221.

(5) *Re Holden*, 1887, 20 Q. B. D. 43.

(6) *Merry v. Pownall*, 1898, 1 Ch. 306 ; *Ideal Bedding Co. v. Holland*, 1907, 2 Ch. 157.

(7) *Ex parte Russell*, 1882, 19 Ch. D. 588.

(8) *Abdul Muwali v. Tahsildar, Kashipur*, A. I. R. 1930 All. 511 : 128 I. C. 3.

54. Who can apply under the section.—See section 54 A and commentary thereunder.

54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent

History.—This is an exact reproduction of section 37 of the Act 3 of 1907. The history of the doctrine of preference in England is a long one. The first statutory provision in England was contained in sub sections (1) and (2) of section 92 of the Act of 1869. Though there was no express enactment before the Act of 1869, still such conveyances, payments, etc., were always held voidable as being in fraud of the bankruptcy laws. It was originally of judicial creation, and it is considered to have been introduced by Lord Mansfield (1). The doctrine was enunciated by him in 1786 in *Thompson v. Freeman* (2) thus: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor." Though the fraudulent preference section is to a great extent an embodiment of the old rules of bankruptcy, the doctrine having been put into definite shape and form by statute, and definite tests having been prescribed by statute, the primary duty of the court is to construe the words of the statute rather than to depend on the decisions prior to the statutory definition (3).

The sections of the Indian Acts are based on section 48 of the Act of 1883. The corresponding section in the Indian Insolvency Act, 1848, was section 24.

Analogous Law.—S. 56, P-t. I. A., is in similar terms, except that instead of the words 'the receiver' we have the words 'the official assignee' and the words 'and shall be annulled by the court,' which occur in sub-section (1) of the present section, do not occur there.

S. 44, B. A., 1914, which corresponds, with certain alterations, to section 48 of the Act of 1883, on which the present section is based, runs as follows :—

"Every conveyance or transfer of property, or charge thereon made,

(1) *Alderson v. Temple*, 1767, 4 Burr. 2235, 2241 : 98 E. R. 165, 168.

(2) (1786) 1 T. R. 155 : 99 E. R. 1026.

(3) *Ex parte Griffith*, 1883, 23 Ch. D. 69 ; *Ex parte Hill*, (1888) 23 Ch. D. 695,

every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

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(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

Sub-section (3) need not be quoted.

The scope of S. 44, B. A., 1914, is wider than that of the Indian sections because it includes transfers in favour of persons other than creditors as well. In other respects, the law in England as well as in India is the same.

Object.—The object of the bankruptcy laws is the equal division of the bankrupt's estate among his creditors. The present section is in one way intended to achieve that object. "Formerly the act of bankruptcy drew the line of separation between that property which might be disposed of by the bankrupt and that which vested in the assignees, but it occurred to those who presided in the courts, that it was unjust to permit a party, at the eve of bankruptcy, to make a voluntary disposition of his property in favour of a particular creditor, leaving the mere husk to the rest, and, therefore, that a transfer made at such a period and under such circumstances as evidently showed that it was made in contemplation of bankruptcy, and in order to favour a particular creditor, should be void" (1). The quotation explains the purpose of this section in an effective manner and also incidentally lays down the conditions to be satisfied for avoiding a transfer on the ground of fraudulent preference under the old rules of bankruptcy before it was the subject of express enactment.

Applicability.—The leading Indian case on the section is *Nripendra Nath Sahu v. Ashutosh Ghosh* (2), where the learned judges considered the English cases on the subject and laid down the Indian Law for the guidance of the lower Court to which the case was remitted for retrial and re-decision. The same case went up in appeal and the matter was again fully discussed by the learned judges of the High Court. Their judgment is reported as *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1916 Cal. 975 (3).

Before a transfer by a debtor of any interest in his property is avoided under the section, four conditions must be fulfilled :—

- (i) the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due ;
- (ii) the transaction must be in favour of a creditor or of some person in trust for a creditor ;

(1) *De Tastet v. Carroll*, 1 Stark 88, *per* Lord Ellenborough.

(2) A. I. R. 1915 Cal. 460 : 29 I. C. 128.

(3) *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1916 Cal. 975 : 43 Cal. 640 : 33 I. C. 58.

S. 54. (iii) the debtor must have acted with the view of giving such creditor a preference over his other creditors ;

(iv) the debtor must have been adjudged insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached (1).

All the four conditions enumerated above must co-exist. If any one of the conditions is not satisfied the section is inapplicable.

Onus.—The leading case on the burden of proof is *Simc Darby & Co. Ltd., v. Official Assignee of Lee Lang Seng* (2). In that case Their Lordships of the Privy Council had to consider and interpret section 51 (1) of the Singapore Bankruptcy Ordinance, which is to the same effect as S. 54, P. I. A., 1920 ; and in interpreting the section Their Lordships followed the law of bankruptcy in England as regards the effect of the corresponding English section. They held that in determining the question whether a transfer is to be deemed fraudulent and void as against the official assignee in bankruptcy the onus is on the assignee who has to show that the case is within the statute. It is for the official receiver to establish the necessary elements which would make that section applicable. The Indian High Courts have consistently held, before and after the Privy Council decision referred to above, that the onus of proving fraudulent preference is on the official receiver or the creditors (3). The question of onus becomes only important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without it (4). Also see the same heading under section 53. The

(1) *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460 : 29 I. C. 128 ; *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1916 Cal. 975 : 33 I. C. 548 : 43 Cal. 640 ; *Ma Kain Pu v. Official Receiver, Mandalay*, 113 I. C. 813 : A. I. R. 1928 Rang. 166 ; *Kalinath Chakravarthi v. Ambica Prosad Das*, 41 I. C. 399 : A. I. R. 1918 Cal. 440.

(2) 107 I. C. 233 : A. I. R. 1928 P. C. 77.

(3) *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460 : 29 I. C. 128 ; *Nripendra Nath Sahu v. Ashutosh Ghosh*, A. I. R. 1916 Cal. 975 : 33 I. C. 548 : 43 Cal. 640 ; *The Official Assignee v. M. C. Bhan*, 51 I. C. 591 : A. I. R. 1919 L. B. 128 ; *Manohar Lal v. Khanzuman*, A. I. R. 1935 Lah. 167 ; *Anjuman Dehikot v. Official Receiver*, A. I. R. 1934 Lah. 991 : 54 I. C. 56 ; *Sundar Singh Sachar v. Bakhshi Shiv Ram*, 144 I. C. 762 : 34 P. L. R. 436 : A. I. R. 1933 Lah. 354 ; *Dina Nath v. Labhu Ram*, 137 I. C. 55 : A. I. R. 1932 Lah. 321 ; *Kashi Nath v. Official Receiver*, 135 I. C. 117 : A. I. R. 1931 All. 142 (2) ; *L. P. R. Chettyar Firm v. R. K. Bannerji*, 9 Rang. 71 : 134 I. C. 744 : A. I. R. 1931 Rang. 136 ; *Official Assignee of Cal. v. Ramchander Kashera*, 60 Cal. 1278 : 149 I. C. 861 (1) : A. I. R. 1934 Cal. 54 ; *Nechaldas v. Official Receiver*, 107 I. C. 210 ; *Official Receiver v. Kewal Mal*, 93 I. C. 372 : A. I. R. 1926 Sind 126 ; *Janki Ram v. Official Receiver, Coimbatore*, 78 I. C. 16 : A. I. R. 1925 Mad. 328 ; *Bapu Reddier v. Official Assignee, Tinnevely*, 37 M. L. J. 246 : 10 L. W. 354 : 1919 M. W. N. 576 : 53 I. C. 642 : A. I. R. 1919 Mad. 36 ; *Kasi Iyer v. Official Receiver, Tanjore*, 124 I. C. 813 : A. I. R. 1929 Mad. 821 ; *Ram Ohand v. Parmanand*, 110 I. C. 824 : A. I. R. 1928 Lah. 744 ; *Ma Kin Pu v. Official Receiver, Mandalay*, 113 I. C. 813 : A. I. R. 1928 Rang. 166 ; *Ex parte Lancaster* ; *In re Marsden*, 1883, 25 Ch. D. 311 ; *In re Laurie, Ex parte Green*, 1898, 5 Manson. 48 ; *J. U. Saing v. K. R. Y. Lakshmann Chettyar*, A. I. R. 1936 Rang. 170 ; *Rathumal v. Kunj Behari Lal*, A. I. R. 1937 All. 4 ; *Sir William Henry Peaty (Gresham Trust, Ltd., 1934, A. C. 252 ; Godbole v. Marstisa Balusa*, A. I. R. 1937 Nag. 197 ; *Official Assignee v. Deivanai Achi*, A. I. R. 1937 Rang. 113 ; *Gopal Balkishan v. Baji Rao Banaji*, A. I. R. 1937 Nag. 117.

(4) *Rathu Mal v. Kunj Behari Lal*, A. I. R. 1937 All. 4.

most important condition of the section is that the transfer must have been made with a view to prefer the creditor in whose favour the transfer is. The question has very often arisen as to what facts the official receiver should prove in order to prove that condition; and in considering that question the question of onus of proof has also been mixed up in some cases. Thus it has been remarked that if the payment is made on the eve of bankruptcy and it has the effect of preferring one creditor over others, it shall be presumed that the transfer was effected with a view to prefer that creditor within the meaning of the section. And the onus shall be shifted on to the creditor to establish that in making the transfer the debtor had any other motive and not the view to prefer. The question of onus is really so closely connected with the question of weighing evidence that it is difficult to say whether the authorities were intended to lay down an inflexible rule of law or a mere rule of practical guidance for appreciating the evidence. We shall advert to this question under a subsequent heading, as it is thought that only after the reader has fully understood the matter of preference that he will be able to appreciate it.

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(1).

Unable to pay his debts.—The first condition of the section is that the debtor must, at the time of the transaction, have been unable to pay his debts out of his own money as they became due. In other words, it means that the transferor must have been practically insolvent (in the ordinary sense of the word) at the time of the transaction. In the determination of the question the fact that the debtor had money locked up, which at a later period may be available for payment of his debts, is immaterial (1). Evidence given in the insolvency proceedings can be used under this section against the transferee to show that the insolvent was not in a position to pay his debts (2).

The transfer must be in favour of a creditor.—The transfer must be in favour of a creditor and must have been made with a view to prefer that creditor. The word creditor means any person who shall be entitled to claim with the other creditors in bankruptcy (3). It has therefore been held that a surety who has not yet been called upon to pay is a creditor within the meaning of this section, as his contingent liability is provable in bankruptcy (4). An acceptor or endorser of a negotiable instrument which has not yet reached maturity is a creditor (5).

The relation of a trustee, who has misappropriated a trust fund, and his *cestui que trust* is that of a debtor and creditor. Although there are other and peculiar elements in the relation between a *cestui que trust* and a trustee, undoubtedly the relation of a debtor and creditor can and does exist (6). In order that the transaction may fall under the section it is

(1) *Nripendra Nath v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460: 29 I. C. 128; *In re Washington Diamond Coy.*, (1893) 3 Ch. 95.

(2) *Ganga Lal Rama Kotayya v. Beemavarata Gurva Reddy*, 23 I. C. 597: A. I. R. 1914 Mad. 355.

(3) *R. D. Sethan v. Kallianji Singji Bhat*, 19 I. C. 57; *Man Kin Pu v. Official Receiver, Mandalay*, 113 I. C. 813: A. I. R. 1928 Rang. 166; *Ismail Mamoon v. Dawoodi Jee*, (1913) 21 I. C. 5.

(4) *Re Pain*, (1897) 1 Q. B. 122; *Re Blackpool Motor Car Co., Ltd.*, (1901) 1 Ch. 77; *Rodrigues v. Rama Swami Chettiar*, 40 Mad. 783: 38 I. C. 783: A. I. R. 1917 Mad. 39, Full Bench; *Siddiq Ahmad v. M. K. M. Firm*, 79 I. C. 813: A. I. R. 1923 Rang. 149.

(5) *R. D. Sethan v. Kallianji Singji Bhat*, 19 I. C. 57.

(6) *Sharp v. Jackson*, 1899, A. C. 419, 426.

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(1). necessary that the creditor must be a previous creditor, that is to say, that his debt must have pre-existed at the time of the transfer. A new creditor, who only becomes a creditor in respect of a transaction, which gives rise to the question as to whether it was a fraudulent preference, can be a creditor within section 5†, as, for example, where a transaction consists of two independent parts (1), the consideration passing to the debtor, thereby creating a debt from the debtor to the creditor, and (2), then, the debtor independently and voluntarily making a transfer in respect of the debt. But where the transaction which results in the transfer is one transaction complete in itself, that view cannot apply (1).

A secured creditor is a creditor within the meaning of this section (2). A contrary view has been expressed by the Calcutta High Court (3). In both the cases the sale in question was in favour of a mortgagee. It is submitted that the Calcutta view is erroneous.

Not only that the transfer should be in favour of a creditor but also the person preferred must be that creditor. As already remarked, the section of the Indian Acts is based on section 48 of the English Act of 1883, which corresponded to section 92 of the English Act of 1869. Under those Acts, it was held that if a payment is made to a creditor not with the intention of preferring that creditor, but with the intention of benefitting another person, who is not a creditor, the payment does not amount to a fraudulent preference. Thus where the debtor paid the debt with the object of benefitting not the creditor but the debtor's surety who had not been called upon to pay and who had not paid the debt, such payment was held not void as against the trustee in bankruptcy and the surety could not be ordered to pay over to the trustee in bankruptcy the amount so paid by the debtor (4). These decisions shall hold good in India, though not in England where by the addition of the words "or any surety or guarantor for the debt due to any such creditor" these decisions have been overruled (5).

A set-off before insolvency of debts for which there would have been a right of set-off under the Insolvency Acts is not a fraudulent preference (6).

With a view of giving that creditor preference.—This is the third condition which the section requires to be fulfilled before a transaction can be set aside as a fraudulent preference under the section. The condition requires that there should have been not only preference of one creditor over the others as a matter of fact but also that the dominant intention of the debtor should have been to prefer. If there

(1) *Bhagwan Das v. Chuttan Lal*, 62 I. C. 732 : 43 All. 427 : A. I. R. 1921 All. 41. See also *Girdhari Lal v. Saran Kishan*, 46 I. C. 667 : A. I. R. 1918 Lah. 35, where the creditor was not a previous creditor and S. 37, P. I. A., 1907, was held inapplicable.

(2) *Seth Jaskaram v. Gaiind Prasad*, 68 I. C. 460 : A. I. R. 1922 Nag. 235.

(3) *Jadu Nath Haldar v. Manindra Nath Chandra*, 80 I. C. 323 : A. I. R. 1923 Cal. 689.

(4) *Re Mills*, 5 Mor. 55, *Re Warren*, (1900) 2 Q. B. 138; *Re Stenotyper, Ltd.*, (901) 1 Ch. 250.

(5) *Re G. Stanley & Co.*, (1915) Ch. 148.

(6) *Re Washington Diamond Mine Co.*, 1893, 3 Ch. 95.

has been no preference in fact, it is not necessary to investigate into the view of the debtor in making the transaction (1). If there has been preference in fact it is further necessary that the dominant intention of the debtor should be found out because that will then decide the fate of the transaction. S. 54
(1).

Test to be applied.—Under the old law it was held that the intention to prefer should be the sole motive of the debtor before the transaction could be attacked. Later English cases held that the view to prefer need only be the substantial or dominant view and not necessarily the sole view (2). To ascertain whether the giving of a preference to a particular creditor, that is, putting that creditor in a better condition relatively to the other creditors than that in which he would be placed by bankruptcy law, was the dominant view in the debtor's mind, the proper test to be applied is: Was the act done voluntarily?—a question the solution of which depends primarily on the inquiry from which party did the proposition originate (3). A voluntary disposition is an act moving from the debtor; the question consequently in most cases, if not always, is: Did the thing move from the debtor or from the creditor (4)? If it moves entirely from the debtor in the sense that it was his spontaneous act uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction amongst his creditors, then the transaction will be condemned as a fraudulent preference (5). If, on the other hand, the proposal for payment of or the disposition of property comes entirely from the creditor and is not collusive, the transaction will stand (6). That the transaction was not the spontaneous act of the debtor can be best established by proving that it was the result of pressure brought to bear on the debtor either by the creditor in the ordinary sense or by a surety. The pressure must be real; the debtor must be under some genuine apprehension, it must have operated in his mind, and the dominant influence affecting it; the transaction must have been entered into by reason of it, and it must not have been fraudulent.

In every case the state of mind of the debtor is a paramount consideration. The intention or view to prefer a creditor as the *causa crasans* of the debtor's conduct is the cardinal point round which the whole question turns; if that intention be shown not to have existed, it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due; nor for this purpose is it true that the debtor must be taken to have intended the natural consequences

(1) *Ramaswami Iyenger v. Chinnathambi Kare*, 140 I. C. 463 : A. I. R. 1932 Mad. 459.

(2) *Ex parte Griffith*, (1888) 23 Ch. D. 69; *Ex parte Hill, re Bird*, (1888) 23 Ch. D. 695.

(3) *In Re Eaton & Co., Exp. Vine*, (1886) 18 Q. B. D. 295; *In re Vautin, Saffery*, (No. 2), 1900, 2 Q. B. 325.

(4) *Ex parte De Tastet*, (1810) 17 Ves. 247; *Strachan v. Barton*, (1856) 11 Exch. 647; *Maung Po San v. Receiver of Ko Kyan*, 158 I. C. 638 : A. I. R. 1935 Rang. 316.

(5) *Exp. Tempest, Craven, In re*, 1870, 6 Ch. 70; *Bills v. Smith*, 1855, 6 B. & S. 314.

(6) *Crosby v. Crouch*, (1809) 11 East 256.

S. 54 of his act (1). A distinction between the words 'intention' 'view' or
 (1). 'object' was drawn in some cases. Accordingly it was held that if preferring the creditor was the substantial view with which the bankrupt entered into the transaction, it is void notwithstanding that its motive may have been to do what he thought right (2). But it will often happen that the motive, though not the thing to be ascertained in order to determine the question of preference or no preference, will go a long way to show what was the bankrupt's view, *i.e.*, what was the object at which he aimed in bringing about the preference (3). Opinion has been expressed that the question is whether in fact the bankrupt had the intention to prefer, and that it does not much matter whether it is called intention, view or object.

The word, 'voluntary' has not been used in the section but the word 'preference' used there, however, itself implies an act of free will, which means the same thing as that the transaction must be voluntary (4). The question is one of fact and the presumption of preference may be rebutted by any circumstances. Thus it can be shown that there was a demand by the creditor and the transaction was made under pressure (5). The pressure must have been real, *i.e.*, it must have operated on the mind of the debtor as the dominant influence affecting him (6), and it must not have been fraudulent (7). The preference is fraudulent if it is established that, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer (8). Payment under demand even though the debt is not yet due and payable does not come within this section (9). Payment in the ordinary course of business to a creditor who came to be paid (10), and payment of trade bills in due course by the insolvent person who is continuing to carry on business falls outside the section. Again, the presumption of fraudulent intention may be rebutted, if it be apparent

(1) *Labhu Ram v. Puran Chand*, A. I. R. 1919 Lah. 45 (2) : 53 I. C. 421, where Halsbury's Laws of England, Vol. 2, para. 471 is cited; *Nripendra Nath v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460 : 29 I. C. 128.

(2) *Re Fletcher*, 9 Mor. 8.

(3) *New Prance and Garrard's Trustee v. Hunting*, 1897, 1 Q. B. 607; (1897), 2 Q. B. 19, on appeal *Sharp v. Jackson*, (1899) A. C. 419.

(4) *Rathumal v. Kunj Behari Lal*, A. I. R. 1937 All. 4.

(5) *Crosby v. Crouch*, 2 Camp. 166; *Official Receiver. Trichinopoly v. Muhammed Meera Sahib*, A. I. R. 1937 Mad. 872.

(6) *Boyd, Exp. Boyd, In re*, 1881, 6 Morr. 209; *Official Receiver, Exp. Bell, In re*, 1892, 10 Mor. 15.

(7) *Exp. Reader, Wrigley, In re*. 1875, 20 Eq. 763.

(8) *Official Receiver Exp. Bell, In re*, 1892, 10 Mor. 16; *Brown v. Kempton*, 1857 : 19 L. J. C. P. 169; *Graham v. Candy*, 1862, 3 F. and F. 206; *Exp. Hall, In re Cooper*, 1882, 19 Ch. D. 580; *Abdul Jabbar v. Onkarnath*, A. I. R. 1936 All. 489 : 163 I. C. 831.

(9) *Thompson v. Freeman*, 1786, 1 T. R. 155 : 99 E. R. 1026; *Strachan v. Barton*, 1856, 11 Ex. 647.

(10) *Rust v. Cooper*, Cowp. 629, per Lord Mansfield; *Abell v. Daniell*, M. and M. 370; *Re Clay and Sons*, 3 Mans. 31.

that the debtor acted in fulfilment of a prior agreement (1), but it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude (2). S. 54
(1).

To rebut the presumption of fraudulent preference it may be shown that the dominant object of the debtor in making the payment for transfer was to benefit himself and not to benefit the creditor (3), or that he did it to repair a wrong, or to escape its consequences with a view to protect himself from civil or criminal proceedings (4) or under an apprehension of legal proceedings (5).

A mere demand where the threat to sue could have had no real effect is not enough, because such a demand cannot be real (6). It has accordingly been held that if a debtor informs his creditor that he is about to become bankrupt or that he will stop payment within a week, and thereupon the creditor threatens him with an action and the debtor makes a payment the payment is a fraudulent preference, for pressure under such circumstances could have no real effect (7). Similarly bills not paid in due course but held over after maturity at the request of the acceptor and subsequently paid full within the section (8).

Prior oral agreement.—Where the transfer is made in pursuance of a previous contract to do so, the transaction cannot be attacked on the ground of fraudulent preference (9). In *ex parte Kevan, in re Crawford*, a debtor, who on 5th November, 1872, committed an act of bankruptcy and was adjudicated thereon on the 28th and who owed four thousand pounds to his mother's estate, being pressed by the executrix for payment, promised to send two thousand three hundred and fifty pounds on account of the debt to the estate. On the 4th November, *i.e.*, the day previous to the act of bankruptcy, he sent bills for 4,000 pounds of which 2,350 pounds were appropriated towards the debt due to the mother's estate and the remainder to an account between the insolvent and the executrix. On these facts the Court of Appeal held that there was no fraudulent preference because the remittance on 4th November was made in

(1) *Re Vingoe and Davis*, 1 Mans. 916; *Blackburn and Co., In re*, (1894) 1 Mans. 416; *In re Jukes, Exp. Official Receiver*, 2 K. B. 58: 86 L. T. 456.

(2) *Re Arnott*, 6 Mor. 215.

(3) *Exp. Stubbins*, 17 Ch. D. 58; *Re Hutchinson*, 35 W. R. 264; *Re Lake*, 1901, 1 K. B. 710.

(4) *Re Lane*, 23 Q. B. D. 74 (payment with a view to reviving a statute-barred debt); *Re Tweedale*, 1892, 2 Q. B. 216 (good bill of sale given for in place of a void one, object being to repair the error).

(5) *Sharp v. Jackson*, 1892, A. C. 419.

(6) *Exp. Wheatley*, 1881, 45 L. T. 80; *Exp. Hall*, 1882, 19 Ch. D. 580; *Narsingdas v. Official Receiver, Sargodha*, A. I. R. 1937 Lah. 53.

(7) *Exp. Hall*, 1882, 19 Ch. D. 580.

(8) *Re Eten & Co.*, (1897), 2 Q. B. 16.

(9) *Halliday v. Halgate*, (1867) 17 L. T. 18; *Exp. Kevan, In re Crawford*, 1874, 9 Ch. Ap. 752; *Exp. McKenzie, Bent, In re*, 1873, 28 L. T. 486; *Exp. Hodgkin, In re Softly*, 1875, 20 Eq. 746: 33 L. T. 62.

S. 54 pursuance of a previous promise. In *ex parte* Hodgkin, *in re* Softly (1) (1). a bank to whom a shipbuilder owed money for advances made towards the building of the ship and to whom the shipbuilder offered security which was refused by the bank, which said that they did not want any security at the moment but that circumstances might arise which would induce them to call upon him to perfect the offer which he made, did afterwards accept as security the ship, then in an unfinished condition, at a time when he was in insolvent circumstances and it was not doubted that the bank was aware of the fact. It was held there that the security was furnished in pursuance of a previous understanding and was not voidable. The same view has been adopted in Indian cases (2). The above principle will, however, not apply to a case where the earlier agreement only contains a vague promise by the debtors to execute a mortgage and does not state what the debtors would offer as security, and the simple mortgage executed by them of practically the whole of their property amounts to an act of bankruptcy (3). Nor it will suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude (4).

Transfer or payment made with a view to benefit the debtor himself.—If the dominant view is to benefit the debtor himself, the effect that a particular creditor is preferred in the sense of obtaining a benefit not shared by others, does not constitute the transaction a fraudulent preference. Thus where the real object of a debtor is only to continue his business and to save himself from serious consequences, the payment is not fraudulent (5). Very often a business man in difficult circumstances needs money which he cannot get without also paying a past debt or furnishing a security for the past as well as the present advance. In such circumstances the dominant view of the debtor is to benefit himself and his business by getting the present loan and not to prefer

(1) 20 E. Q. 746.

(2) *Nripendra Nath v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460; *Nripendra Nath Sahu v. Ashutosh Ghosh*, (1916) 43 Cal. 640; 33 I. C. 548; *P. S. Narayan Ayyar v. Official Receiver, South Malabar*, A. I. R. 1934 Mad. 294; 150 I. C. 339; *District Official Receiver, Tinnevely v. Nalla Perumal Pillai*, 119 I. C. 708; A. I. R. 1929 Mad. 471.

(3) *Ramasami Nayakar v. Venkata Sami Nayakar*, 145 I. C. 876; A. I. R. 1933 Mad. 653.

(4) *Suffolk Exp.*, *Fletcher*, *In re*, 1891, 9 Mor. 8; *Vingo*, *In re*, *Viney Exp.*, 1894, 1 Mans. 416; *Blackburn and Co.*, *In re*, 1899, 2 Ch. 725; 48 W. R. 186; *In re Jukes*, *Exp.* *Official Receiver*, 1902, 2 K. B. 58; 86 L. T. 456; *Nripendra Nath v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 460.

(5) *Re Clay and Sons*, 3 Mans. 31 (payment of trade bills in due course by an insolvent person who is continuing to carry on business); *Samu Pattar v. Wilson*, 73 I. C. 532; A. I. R. 1924 Mad. 180; *Rooramal v. Official Receiver, Karnal*, 137 I. C. 6; A. I. R. 1932 Lah. 381; *Tomkins v. Saffery*, 1877, 3 A. C. 213, 235; *Official Assignee v. M. P. A. K. Chettyar Firm*, (1927) 5 Rang. 229; 103 I. C. 174; A. I. R. 1927 Rang. 190; *Official Receiver, Tinnevely v. Nalla Terumal*, A. I. R. 1929 Mad. 471; 119 I. C. 708; *Mela Ram v. Ghulam Dastgir*, 1929, 114 I. C. 709; A. I. R. 1929 Lah. 159; *Official Receiver, Trichinopoly v. Muhammad Meera Sahib*, A. I. R. 1937 Mad. 872.

the creditor by paying the past debt (1).

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(1).

A person holding a decree against a debtor is entitled to execute it any time. If, instead of executing the decree immediately, he agrees to wait in consideration of the security being given to him for the judgment-debt the transaction is not a fraudulent preference, for the dominant view of the debtor is to benefit himself. There is hardly any benefit to the decree-holder, for he could have realised the amount of the decree by immediate attachment and sale of the debtor's property (2). The benefit should be to the debtor's business and therefore for his creditors. Where therefore a preference is given in return for a money, payment of which is made for the benefit of the insolvent personally and which would not possibly be for the benefit of his business and therefore for his creditors is a fraudulent preference (3).

Other circumstances negating intent to prefer.—As already noted, the question which arises for determination in each case is the dominant intention of the debtor. Such an intention can be negated by proving any circumstances which would go to prove that the debtor's dominant intention was some motive other than that of preferring the creditor in question. We have considered some of those circumstances under the headings, pressure, prior oral agreement and transfer or payment with a view to benefit the debtor himself. Those headings, however, do not exhaust all the circumstances in which the intention to prefer can be repelled. Where the debtor makes a payment in the belief, on reasonable grounds, that he is under a legal obligation to pay or that he was only doing what he felt himself bound or compelled to do, the case is not one of a fraudulent preference (4).

Where the object in making the payment is to save the debtor from exposure or criminal proceedings (5), or to revive an undisputed debt so that it may not become time-barred (6), or to make a reparation for a past wrong, such as breach of trust, the payment is not fraudulent. Similarly a payment with a view to revive a statute-barred debt (7) or to give a good bill of sale to replace a void one (8) is not within the section. The abandonment of a prosecution, whilst the result is still

(1) *Exp.* Boyle, 1871, 25 L. T. 550; *Re* Arnott, 1889, 6 Mor. 215; *Bhagwandas and Co. v. Chhuttanlal*, 62 I. C. 732 : 43 All. 427 : A. I. R. 1921 All. 41; *Daulat Ram v. Devki Nandan*, 75 I. C. 861 : A. I. R. 1924 Lah. 686; *F. F. Campbell and Co. v. Mithomal Dwarkadas*, 31 I. C. 50 : A. I. R. 1915 Sind 15; *Motimal Ramsarup v. Daulatram*, 92 I. C. 296 : A. I. R. 1926 Lah. 231; *Bansi Lal v. Sri Ram*, Official Receiver, 12 Lah. L. J. 316; *Rama Swami Iyengar v. Chinnaphambikone*, 140 I. C. 463 : A. I. R. 1932 Mad. 459; *Racborn and Co. v. Zoollikofer and Co.*, (1924) 2 Rang. 193 : 83 I. C. 440 : A. I. R. 1924 Rang. 308.

(2) *Re* Wilkinson, 1884, 1 Morr. 65; *Re* Glanville, 1885, 2 Morr. 71.

(3) *A. K. R. M. N. C. T. Chettyar Firm v. Mauag Ba Chit*, A. I. R. 1930 Rang. 315 : 28 I. C. 589.

(4) *Re* Vautin, (1900) 2 Q. B. 235; *Sime Darby & Co., v. Official Assignee*, 107 I. C. 233 : A. I. R. 1928 P. C. 77.

(5) *Umrao Singh v. Punjab National Bank*, Ludhiana, 59 I. C. 578 : A. I. R. 1921 Lah. 274; *Puran Chand v. Puran Chand*, A. I. R. 1923 Lah. 652 (2) : 75 I. C. 441; *Exp.* Taylor, 1887, 18 Q. B. D. 295.

(6) *Exp.* Gaze, 1889, 23 Q. B. D. 74.

(7) *Re* Lake, 1901, 1 K. B. 710; *Exp.* Taylor, 1887, 18 Q. B. D. 295.

(8) *Re* Lane, 23 Q. B. D. 24.

(9) *Re* Tweedale, 1892, 2 Q. B. 216.

- §. 54 (1). uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred (1). Payment of a mortgage debt to a mortgagee cannot be a fraudulent preference (2). A lease by a debtor on the eve of his insolvency at a fair rent is valid (3).

Evidence of intent to prefer.—The question is one of fact and depends on the circumstances proved in each case (4). The mere fact that the act had the effect of preferring one creditor over the other is not enough (5). The ordinary presumption that that which has the natural effect of preferring a creditor is presumed to have been intended to have that effect does not apply here (6). The contrary appears to have been laid down in a Madras case, where the English decisions were not followed (7).

A transfer of a man's whole assets to one creditor for no reason whatsoever, and which has the effect of giving the creditor a preference over other creditors, should be presumed to be fraudulent (8). This will be particularly so where the payment or transfer of property is made in discharge of an old debt and on the eve of bankruptcy in the absence of any satisfactory explanation for such payment or transfer (9). In some cases it appears to have been laid down that if the payment or transfer is made by a debtor in imminent expectation of bankruptcy, the presumption immediately arises that he makes that payment with the dominant view of giving preference to that creditor over his other creditors (10). This view has however not been followed in other cases where it has been held that a mere payment of a debt by a debtor in imminent expectation of bankruptcy is not by itself sufficient to prove the intention

(1) *Miller v. Barlow*, 1871, 14 M. L. A. 209 : 20 E. R. 208.

(2) *Jadunath v. Manindra Nath*, 80 I. C. 323 : A. I. R. 1923 Cal. 689.

(3) *Desraj v. Sagarmal*, 38 All. 37 : 31 I. C. 716 : A. I. R. 1915 All. 389.

(4) *Subramaniam Chettiar v. Subbaraya Goundan*, 155 I. C. 611 : A. I. R. 1935 Mad. 246 ; *Bajinath v. Atal Prasad*, A. I. R. 1937 Pat. 134.

(5) *Bappu Reddiar v. Official Assignee, Tinnevely*, 42 Mad. 510 : 49 I. C. 968 : A. I. R. 1919 Mad. 333 ; *Kalinath v. Ambica Prasad*, 41 I. C. 399 : A. I. R. 1918 Cal. 440 ; *Nripendra Nath v. Asutosh*, A. I. R. 1915 Cal. 461 ; *Mamayya v. Vinkateswarulu*, 63 I. C. 916 : 44 Mad. 810 : A. I. R. 1921 Mad. 294 ; *Bansilal v. Sriram*, Official Receiver, 12 L. L. J. 316.

(6) *Labhu Ram v. Puran Chand*, A. I. R. 1919 Loh. 24 (2) ; *Nripendra-nath Sahu v. Asutosh Ghosh*, A. I. R. 1915 Cal. 460.

(7) *Viswanathan v. Official Assignee of Madras*, 32 I. C. 795 : A. I. R. 1917 Mad. 681 (2).

(8) *A. K. R. M. M. C. T. Chettyar Firm v. Maung Ba Chit*, A. I. R. 1930 Rang. 315 : 128 I. C. 589 ; *Krishna Das v. Raja Ram Bhatt*, A. I. R. 1930 All. 282 : 52 All. 476 : 126 I. C. 363 ; *Bajinath v. Atal Prasad*, A. I. R. 1937 Pat. 134.

(9) *Nechal Chand v. Official Receiver*, 1928, 107 I. C. 210 (Sind) ; *Official Receiver v. Kewalmal-Ajumal*, 93 I. C. 372 : A. I. R. 1926 Sind 123 ; *Dinanath v. Labhu Ram*, 137 I. C. 55 : A. I. R. 1932 Lah. 321.

(10) *Bolland, Exp., Cherry, In re*, 1871, 7 Ch. App. 24 ; *In re Dyer*, (1901) 1 K. B., 710 ; *Labhu Ram v. Puranchand*, A. I. R. 1919 Lah. 45 (2) ;

to give preference (1). For instances of cases which were decided on the facts, the undermentioned cases may also be consulted (2). The state of mind of the insolvent on the date of payment and not prior to it is to be considered (3). But evidence of acts of preference in favour of other creditors committed by the latter shortly before or after the transaction impugned is admissible to show the debtor's intent (4).

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(1).

Good faith of preferred creditor immaterial—Under the law prior to the Bankruptcy Act, 1869, the debtor's intention alone was material; good faith on the part of the creditor was entirely immaterial. Under the Bankruptcy Act, 1869, it was held that even if a transaction was void as a fraudulent preference, it could be upheld by a creditor if he acted in good faith, *i.e.*, without knowledge of the debtor's insolvency and of the debtor's intent to prefer him (5). This was because S. 92, B. A., 1869, contained a saving clause at its end in the following terms:—

“But this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.”

The saving clause at the end of section 92 was omitted in S. 48, B. A., 1883, and it does not occur in the present Bankruptcy Act, 1914. The Indian law is based on S. 48, B. A., 1883, and the saving clause, which was at the end of S. 92, B. A., 1869, does not occur in the Indian Acts. Accordingly both under the English (2) and the Indian Law (7) it has now been held that the good faith or the intention of the transferee is immaterial and that what has to be looked to is the dominant intention of the debtor.

Illustrative cases.—Below we give some cases gleaned from law reports in the form of illustrations to explain the application of the principles given in the preceding paragraphs.

(i) The debtor was expecting suits by almost all creditors and was in practically hopeless circumstances. It was held that a mere threat to sue was not such pressure as to change the nature of the

(1) *In re Laurie*, 1898, 67 L. J. Q. B. 431, *per* Wright, J.; *Bulteel & Colmore v. Trustee in Bankruptcy of Parker and Bulteel*, (1916) 32 T. L. R. 661, *per* Younger, J.; *In re Cohen*, 1924, 2 Ch. 515, *per* Pollock, M. R.; *Nripendra Nath Sahu v. Asutosh Ghosh*, A. I. R. 1915 Cal. 460; *The Official Assignee v. M. C. Bhan*, 51 L. C. 591; A. I. R. 1928 Lah. 744; 110 L. C. 824; *Rathumal v. Kunj Beharilal*, A. I. R. 1937 All. 4.

(2) *Adakammi Achi v. Official Assignee*, A. I. R. 1934 Rang. 17; 11 Rang. 489; 149 L. C. 145; *Kishanlal v. Mirzanbibi*, A. I. R. 1934 Lah. 271 (1); 150 L. C. 240; *Rudhekishan v. Fateh Mohamed*, A. I. R. 1933 Lah. 856; 147 L. C. 262; *Bashran v. Motiram*, A. I. R. 1933 All. 431; 143 L. C. 609; *Balmokand v. Ayasingh*, 13 I. C. 68; 26 P. L. R. 1912.

(3) *Ghanda Bhai Ghulabchand v. Balkrishan Vaman*, A. I. R. 1930 Bom. 217; 127 L. C. 190.

(4) *Re Ramsay*, (1913) 2 K. B. 80; *Chidambaram v. Daivanaiachi*, A. I. R. 1936 Mad. 275; 161 L. C. 348; *Rathumal v. Kunjbeharilal*, A. I. R. 1937 All. 4.

(5) *Butcher v. Stead*, (1895) L. R. 7 H. L. 839.

(6) *Rust v. Cooper*, Cowp. 629; *Davison v. Robinson*, 3 Jur. N. S. 791, decided before the Act of 1869; *William's Bankruptcy Practice*, 14th edition, p. 321.

(7) *Harnam Singh v. Gopal Das*, 109 L. C. 370; A. I. R. 1929 Lah. 79; *Mamayya v. Official Receiver, Guntur*, 92 L. C. 723; A. I. R. 1926 Mad. 338.

S. 54 debtor's debt from a voluntary to an involuntary one, as the pressure
(1). could not have any real effect (1).

(ii) Where the transfer of the debtor's land was made in favour of the creditor only when legal proceedings were taken against him, it was held that there was real pressure under which the transfer was made (2).

(iii) Where the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure and gives the security, although it may be well known to both at the same time that the effect will be to give that particular creditor an advantage over the other creditors of the insolvent, the transaction is perfectly good and valid (b).

(iv) The debtors were pressed by certain of their creditors and they proceeded in the course of their business to borrow money for the payment of the debts due to those creditors. The transaction was upheld (4).

(v) The alienee bank had already obtained a decree against the debtor and was executing that decree and in execution of it had attached the debtor's sheep and goats. Thereupon the debtor settled matters completely with the bank and mortgaged his house to them. It was held that the pressure had been put upon him by the bank and it was in order to get his goats and sheep released that he entered into the transaction. The transaction was upheld (5).

(vi) A debtor who was unable to pay his debts voluntarily gave over to a near relation of his, who was one of the creditors, practically the only movable assets he had, *i. e.*, *viz.*, a promissory note duly assigned and some piecegoods. There was no evidence of any demand or pressure put on the debtor. The transaction was set aside (6).

(vii) The creditor threatened the debtor with filing a suit against him; there was no suggestion of relationship or collusion between the parties. The transaction was upheld (7).

(viii) The debtor* was in imminent expectation of bankruptcy. The creditor whose son was a lawyer and whose husband was a petitioner threatened the debtor with legal proceedings. The transaction was upheld (8).

(ix) The debtor believed reasonably that the transferees were entitled, in the events which had happened, to have actual possession of the

(1) *Manohar Lal v. Khan Zaman*, A. I. R. 1935 Lah. 167.

(2) *Subramanian Chettiar v. Subbaraya Goundan*, 155 I. C. 611 : A. I. R. 1935 Mad. 246.

(3) *K. P. A. P. Chettiar Firm v. U. Maung, Receiver*, A. I. R. 1934 Rang. 208 : 153 I. C. 19.

(4) *Firm Hardhayan Das v. Jagan Nath Marwari*, A. I. R. 1934 Pat. 526 ; 152 I. C. 655.

(5) *Anjuman Dehi Kot v. Official Receiver, Gurdaspur*, A. I. R. 1934 Lah. 994 : 154 I. C. 56.

(6) *Rodhe Shah v. Sarmukh Singh*, 145 I. C. 874 : A. I. R. 1933 Lah. 620.

(7) *O. R. M. N. S. S. Chettyar Firm v. ManAwe Yon*, A. I. R. 1933 Rang. 216 : 147 I. C. 1195.

(8) *Sundar Singh Sachar v. Bakhshi Shiv Ram*, 144 I. C. 762 : A. I. R. 1933 Lah. 354.

property and to put an end to the possession and power of disposition which he had as their agent, and, further, that as he had wrongly disposed of the proceeds of some of the transferred property for his own purposes, he would be running grave risks if he failed to deliver the property of his own in its place. The debtor was the agent and he had misappropriated some of the rubber belonging to his principal. It was held that the dominant intention of the debtor was that he was only doing what he felt himself bound or compelled to do and the transaction was valid (1). S. 54
(1).

(x) An insolvent was unable to pay his creditors and had stopped a considerable portion of his business. He was all the while making genuine efforts to set right his financial position without admitting defeat. In such circumstances his bankers who had a legitimate grievance against him exerted a severe pressure upon him; whereupon the insolvent executed a registered security bond. The pressure was exerted by word of mouth. The transaction was upheld (2).

(xi) The creditor threatened the debtor with insolvency proceedings and the debtor under that apprehension entered into an arrangement with that creditor. The arrangement was upheld (3).

(xii) The creditor had sent money for a specific purpose which had been misappropriated by the insolvent. There was a threat of prosecution for criminal breach of trust. The debtor transferred his house, believing that he was only doing what he felt bound or compelled to do and where it appeared to him that the alternative to handing over was a prosecution for criminal breach of trust, the transaction was upheld (4).

(xiii) The insolvents who were in a notorious financial position known both to them and their creditors agreed shortly before filing the insolvency application to alienate practically the whole of their property for value arbitrarily fixed to a few of their innumerable creditors, alleging pressure brought by the creditors to pay by letter, telegram, notice or in person, though not in one case were legal proceedings taken against the insolvents. It was held that there was a conspiracy between the insolvents and creditors who received the property and that there was fraudulent preference in favour of the creditors (5).

(xiv) An insolvent in the period of one week got rid of all his attachable property and executed a certain sale-deed in favour of creditor A upon his promising that he will pay the debt due to the creditor B. The insolvent obtained no advantage from the sale. B pressed the insolvent for the payment of the debt but was not aware until a few days later that the sale-deed was executed and that A had promised to pay off the debts due to himself. It was held that there was no real pressure (6).

(1) *Sime Darby & Co., Ltd. v. Official Assignee of the Estate of Lee Lang Sang*, A. I. R. 1928 P. C. 77 : 107 I. C. 233.

(2) *Kasi Iyer v. Official Receiver, Tanjore*, 12 I. C. 213 : A. I. R. 1929 Mad. 821.

(3) *Mansookh Lal-Doalat Chand v. Nagar Das-Mool Chand*, 117 I. C. 569 : 6 Rang. 536 : A. I. R. 1928 Rang. 302.

(4) *Sholapur Spinning & Weaving Co. v. Pandhari Nath*, 113 I. C. 148 : A. I. R. 1928 Bom. 341.

(5) *Narsingdas v. Official Receiver, Sargodha*, A. I. R. 1937 Lah. 53.

(6) *Gopal Balkishana v. Baji Rao*, A. I. R. 1937 Nag. 117.

4 Calculation of period of three months—The last condition is that the debtor must be adjudged insolvent on a petition presented within three calendar months after the date of the transaction. In calculating this period the day on which the petition was presented is excluded (1). The period of three months is not a period of limitation but a condition precedent to the setting aside of a transaction under the section. For full notes see commentary under section 6, clause (c). Also refer to the notes under the same section as to when a transfer is complete for the purposes of calculating the period of three months.

Where a sale is effected, within three months of the insolvency, in consideration of a balance account due since over two years to the purchaser creditor, the transaction may be void under the section. The period of three months is to be counted from the date of the transfer and not from the date of the debt which forms its consideration (2). Where a consent decree was passed against the insolvent more than three months prior to the date of the petition, an order of rateable distribution passed in execution cannot be annulled under section 54 as a fraudulent preference, though the execution proceedings might have been taken within three months of the petition (3).

Shall be annulled.—In insolvency the court is not only competent to entertain an application under the section, but also it is bound to inquire judicially into the matter when it is brought to its notice (4). The proper person to make such an application is the trustee. A trustee in bankruptcy ought not to make an application to set aside a transaction on the ground that it is a fraudulent preference or to allow such an application to be made in his name where the avoidance of the transaction will benefit not the estate, but only a particular creditor who has a security upon the property dealt with (5).

Sub-section (2).—The sub section protects persons who acquire a title through or under a creditor of the insolvent in good faith and for valuable consideration. The sub-section does not include the creditors of the insolvent. The result is that even though the creditor may have acted in good faith and may have paid valuable consideration but if the debtor's intention was fraudulent the transaction would be set aside (6). The onus of proving good faith is upon the person desiring to avail himself of the protection of the saving clause.

Exclusive jurisdiction of the Insolvency Court and Res judicata.—See commentary under the same heading under section 53.

Who can apply.—See section 54A.

Limitation for application.—See the same heading under section 53.

Appeal.—See the same heading under section 53.

(1) *Re Dawes*, 1897, 4 Mans 117; *Re Harvey*, 1890, 7 Morr 138.

(2) *Vithal v. Gopal*, 69 I. C. 556; A. I. R. 1922 Nag. 260.

(3) *Chain Rai v. Dola Ram*, A. I. R. 1932 Sind 3; 136 I. C. 522.

(4) *Nickamal v. The Marwar Bank, Ltd.*, Lahore, 52 I. C. 188; A. I. R. 1920 Lah. 470.

(5) *Exp. Cooper*, L. R. 10 Ch. 510; *Willmot v. London Celluloid Co.*, 34 Ch. D. 147.

(6) *Davison v. Robinson*, 1857, 3 Jur. N. S. 791; *Butcher v. Stead*, 1875, 7 H. L. 839; *Sharp v. Jackson*, 1899, A. C. 419; *Nripendra Nath Sahu v. Asutosh Ghosh*, A. I. R. 1915 Cal. 460.

Rights of transferees whose alienations are avoided.—See the **S. 54A.** same heading under section 53.

Miscellaneous.—The official receiver is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors, nor is he precluded on that account from applying under section 54 to have it annulled as a fraudulent preference (1). A day after the insolvency of a firm certain entries were made in the account books showing satisfaction in cash of certain creditors who alleged that they had merely taken *havalas* of certain debtors of the firm. When these entries were made there was the concurrence or, at least, the connivance of the debtors as well as the creditors of the insolvent firm concerned in the transfer. This satisfaction was found to be an undue preference. It was held that, as the claims of the creditors were fully satisfied according to the new arrangement to which they were parties, and as the transactions were set aside the payments must be refunded; it was immaterial if the creditors had been paid in cash or had chosen to accept the *havalas* of debtors in full satisfaction (2). An adjudicated insolvent had, a few days before his application, granted a lease of certain occupancy holding of his in favour of a certain person. A creditor objected to the lease on the allegation that the lease was fictitious and that the occupancy was a valuable one. The district judge annulled the lease and ordered the receiver to surrender the holding. It was held that the order was wrong as it was the duty of the receiver as well as the court while administering the estate of an insolvent to preserve any property which was of value and that the lease was not vitiated by the provisions of S. 37, P. I. A., 1907 (3). An application by creditors under section 54 to set aside an alienation made by the insolvent can lie even if the alienee's name is entered in the schedule of creditors (4).

54A. A petition for the annulment of any transfer under section 53, or of any transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition.

History.—This section was recently added by section 3 of the Provincial Insolvency (Amendment) Act, XXXIX of 1920. No similar provision existed in the Act III of 1907, or in the Act V of 1920, as it was originally passed. Sections 53 and 54 do not give any indication as to who can move the court under those sections or as to whether it was necessary for the court, before it could take action under those sections, to be moved by an application made to it. There was a divergence of

(1) *Sunder Singh Sachar v. Bakhshi Shiv Ram*, 144 I. C. 762 : A. I. R. 1933 Lah. 354.

(2) *Nanak Chand-Ramchand v. Official Receiver*, 143 I. C. 628 ; A. I. R. 1933 Sind 85.

(3) *Des Raj v. Sagar Mal*, 38 All. 37 : 31 I. C. 617 : A. I. R. 1915 All. 389.

(4) *Diwanchand v. Mohan Singh*, A. I. R. 1937 Lah. 242.

- 54A. judicial opinion on the point and the present amendment was made to set that conflict at rest.

Analogous law.—The English practice, notwithstanding the absence of any express provision to that effect, is that the proper person to make an application under the sections is the trustee only (1). Where the trustee refuses to make an application, the court may allow any creditor to take action. In the Presidency-towns Insolvency Act also, there is no express provision. And the practice is not uniform in cases governed by the Presidency-towns Insolvency Act. In Calcutta, an application is made by the official assignee, or, with the leave of the court, by a creditor who has proved his debt and who satisfies the court that the official assignee has refused to make the application (2). Similar practice prevails in Bombay. The Rangoon High Court has, however, held that a creditor has no *locus standi* to apply even with the leave of the court and that if the official assignee refuses to take action, the creditor's only remedy is to appeal from the decision of the official assignee under section 68 of the Act (3).

Scope.—The section contemplates those cases where a receiver has been appointed. Where the receiver has not been appointed, the section has no application. In such a case it is provided by section 58 that the insolvency court may exercise all the powers conferred on a receiver under this Act. It has, therefore, been held by the Nagpur High Court that section 54A should be read subject to the provisions of that section and that, in a case where no receiver is appointed, a creditor is entitled to move the court to take action under section 53 (4). Even before the enactment of the present section, this view was consistently held by the Nagpur Court and the words "voidable against receiver" in section 53 were interpreted as meaning "voidable against the court," on the authority of section 58, in cases where no receiver was appointed (5). The contrary view that, until a receiver is appointed in an insolvency case, a creditor has no *locus standi* to apply for annulment of any transfer was however taken in other cases (6). The Nagpur view is in complete accord with that adopted by the Patna High Court in *Mst. Bechni v. Sheikh Sidique* (7), where it was held that in the case of a summary administration of the insolvency estate (when no receiver is appointed), section 54A has no application, and that any creditor may move the court to take action under section 53 of the Act.

Cases before the amendment.—Before the enactment of the present section it was held, without any dissent, that the receiver was the proper

(1) *Exp. Cooper*, L. R. 10 Ch. 510; *Willmott v. London Celluloid Co.*, 1886, 31 Ch. D. 147.

(2) *Re Suraj Mal-Mungchand*, 70 I. C. 463; A. I. R. 1921 Cal. 403; *Brijrai-Harnandrai, in re*, 60 Cal. 1367; 149 I. C. 995; A. I. R. 1934 Cal. 232.

(3) In the matter of the estate of P. A. Mohmad (anny), (1927) 5 Rang. 375; 104 I. C. 89; A. I. R. 1927 Rang. 284.

(4) *Sita Ram v. Mst. Nathi Bai*, A. I. R. 1933 Nag. 365; 147 I. C. 1253.

(5) *Bansi Lal v. Rang Lal*, A. I. R. 1923 Nag. 97; 71 I. C. 418; *Sheolal v. Girdhari Lal*, A. I. R. 1924 Nag. 361; *Gopal Rao v. Hira Lal*, A. I. R. 1925 Nag. 225; 83 I. C. 246.

(6) *Kaulleshar Ram v. Bhawan Prasad*, A. I. R. 1917 All. 15; 42 I. C. 845; *Appireddi v. Appireddi*, A. I. R. 1922 Mad. 246; 45 Mad. 189; 66 I. C. 271.

(7) A. I. R. 1930, Patna 14; 122 I. C. 810; 9 Pat. 172.

person to move the court under sections 53 and 54 ; and no case appears to have gone so far as to lay down that a creditor had no right to move the court in any circumstances whatsoever. The only two cases which had ever been relied upon for supporting the latter proposition were *Mariappa Pillai v. Raman Chettiar* (1) and *Jhabba Lal v. Shibcharandas* (2). In the Madras case there is an observation that it is the official receiver who must set the court in motion, but it was not intended to be laid down in that case that, under no circumstances, could a creditor move the court for an order under sections 53 or 54. The Allahabad ruling was also based on the facts. What the creditor did in that case was to go over the head of the receiver and to want the court to take action. The correct proposition of law was laid down by the Patna High Court in *Hemraj Chumpalal v. Ramkrishna* (3), in the following words :—"What was contemplated by the procedure provided for by this statute was that the receiver was the person to impeach any fraudulent transfer or conveyance by the insolvent of his property. If the receiver refused to do so, then it would be open to any creditor to apply to the judge for leave to institute a proceeding under section 36 on his own behalf and on behalf of the other creditors. But, until the receiver refuses or declines to act, no one else can do so because he is the person to set the proceedings under section 36 in motion." The Patna High Court view is in accordance with the view taken in England (4). The Patna view was followed in most cases (5). The present section gives effect to the Patna view and the English practice. It rules the matter now (6).

Reasons for not allowing the creditor to make an application in the first instance.—In most cases the proper person to move the court is the receiver. The court should not entertain an application by the creditor unless the receiver refuses to act. The reasons for not allowing the creditors to move the court without any reference to the receiver were thus stated by Walsh, J., in *Jhabba Lal v. Shib Charandas* (7) :—"Creditors have a right to prove for their own claims, a right to supply the receiver with information relating to claims which the insolvent's estate may have against other persons ; and they have a right to bring the receiver's conduct and decision before the court, if he declines to act or neglects his duties, but they have no legal interest in the insolvent's estate and no title to represent. If they want the receiver to litigate the question they can supply him with funds, or indemnify him against the costs in the event of failure, if he is unable to proceed for want of funds ; but it would be contrary to the whole scheme of the Insolvency Act, if one out of a large number of creditors was at liberty to start all kinds of questions and set the law in motion independently of the receiver. The proper course, if a creditor is desirous of supporting the receiver and securing a decision in his favour, is to attend the court to watch the

(1) 1919, 42 Mad. 322 : A. I. R. 1919 Mad. 101 : 52 I. C. 519.

(2) 39 All. 152 : A. I. R. 1917 All. 160 : 37 I. C. 76.

(3) A. I. R. 1916 Pat. 279 : 38 I. C. 369 : 2 P. L. J. 101.

(4) *Exp. Kearsley*, 55 L. J. Q. B. 325.

(5) *Appireddi v. Appireddi*, 66 I. C. 271 : 45 Mad. 189 : A. I. R. 1922 Mad. 246 ; *Ananth Narayana Ayar v. Ramasubbaiyar*, 79 I. C. 395 : 47 Mad. 673 : A. I. R. 1924 Mad. 346 ; *Basanti Bai v. Nanhemal*, 89 I. C. 357 : 47 All. 864 : A. I. R. 1926 All. 29 ; *Daryai Singh v. Kunj Lal*, 75 I. C. 995 : A. I. R. 1924 Lah. 553 (obiter) ; *Nikkamal v. Marwar Bank, Ltd.*, A. I. R. 1920 Lah. 470 : 52 I. C. 188.

(6) *Subramanian Chettiar v. Subbaraya Goundan*, 155 I. C. 611 : A. I. R. 1935 Mad. 246.

(7) A. I. R. 1917 All. 160 : 1917, 39 All. 152 : 37 I. C. 76.

S. 54 proceedings, or obtain the permission of the court to intervene is *amicus curiæ*."

A.

Creditor—Under the section it is either the receiver or the creditor who has proved his debt who can apply under the section and no one else. Thus it is not open to a previous gratuitous transferee (1), or a debtor of the insolvent (2) to apply. Where the court holds that a creditor has no *locus standi* to present an application for annulling a transaction under section 53, having violated the provisions of section 54A, the court has no jurisdiction to give a decision on the merits. And the decision, if given, is *ultra vires* (3).

Who has proved his debt The expression does not mean that the debt of the creditor should have been admitted by the court of receiver. It only means a creditor who has tendered proof of his debt in the mode prescribed by section 59.

With the leave of the court.—The leave is to be granted only if the applicant is a creditor who has proved his debt and he satisfies the court that the receiver has been requested and has refused to make such a petition. The principles on which leave should be granted were thus laid down by Cave, J., in an English case :—

"Now the proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the court and apply for leave to use the name of the trustee, on giving him any indemnity against costs. On such application, the court will consider the nature of the proposed proceedings, and, if satisfied that there are *prima facie* grounds for allowing the creditors to proceed, will grant the application (4).

Such leave is to be granted only where it is intended to benefit the general body of creditors. Where the setting aside of the transaction will benefit only one creditor and not all of them, the trustee in bankruptcy should not make an application or, if the application is made by a creditor, the court should refuse leave (5). In granting leave to a creditor the court may ask him to furnish sufficient security for costs in case of his failure to get the transaction set aside; and the official receiver should not as a matter of course refuse to make the application where the creditors undertake to indemnify him for costs (6).

Appeal from receiver's refusal to apply.—Acts of the official receiver are appealable to the Court under section 58. As to whether the receiver's refusal amounts to an act within the meaning of that section see commentary under that section.

(1) *Ramcharanlal v. Basdeo Sahai*, 102 I. C. 92 : A. I. R. 1927 All. 731.

(2) *Ram Sarup v. Jagat Ram*, 59 I. C. 977 : 2 Lah. 102 : A. I. R. 1921 Lah. 200. (Case under the Companies Act.)

(3) *U. Tha Hlaing v. Mohamed Ishaq*, 128 I. C. 592 : A. I. R. 1930 Rang. 332 (1).

(4) *Ex parte Kearsley*, 55 L. J. Q. B. 225.

(5) *Exp. Cooper*, L. R. 10 Ch. 510 ; *Willmott v. London Celluloid Co.*, 34 Ch. D. 147.

(6) *Anantha Narayan Aiyar v. Rama Subba Aiyar*, 47 Mad. 678 : 79 I. C. 395 ; A. I. R. 1924 Mad. 345.

Sections 54A and section 75.—The principle of section 54A applies to appeals by creditors from orders under sections 53 and 54 (1). **S. 55.**

Miscellaneous—The receiver is not bound by the admission of a mortgage by the insolvent or by some of his creditors ; nor is he precluded on that account from applying under section 54 (2). Similarly a decree under O. 21, r 63, C. P. C., against some creditors in favour of a transferee from the insolvent does not bind the receiver, who can apply under the section (3). See also section 53.

55. Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

Protection of
bona fide transac-
tions.

- (a) any payment by the insolvent to any of his creditors ;
- (b) any payment or delivery to the insolvent ;
- (c) any transfer by the insolvent for valuable consideration ; or
- (d) any contract or dealing by or with the insolvent for valuable consideration :

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

History.—This is section 38 of the Act III of 1907, except for the clause “and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor,” which did not occur in the old Act. The result of the alteration has been to narrow down the protection given by the section. Under the old section transactions, which took place before the date of the order of adjudication, even though with notice of the presentation of the insolvency petition, were protected but they are not protected now. The amendment has, however, no retrospective effect and cannot disturb or interfere with vested rights. Where, therefore, the mortgage had been effected six months before the Act V of 1920 came into force and according to the law then in force the mortgage was valid, notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending ; for it was effected for valuable consideration and was protected by the proviso to section 38 of the Act III of 1907, the rights

(3) *Radhakishan Tirathram v. Fateh Mahomed*, 147 I. C. 262 : A. I. R. 1933 Lah. 856.

(4) *Sundarsingh Sachar v. Bakhshi Shiv Ram*, 144 I. C. 762 : A. I. R. 1933 Lah. 354.

3. 55. of the mortgagee could not be lost by subsequent change in the law made by the enactment of Act V of 1920 and the repeal of Act III of 1911.

Analogous law—S. 57, P. I. A., exactly in substance the present section. The subject of protection of *bona fide* transactions is dealt with in Ss. 45 and 46, B. A., 1914, and S. 4, Bankruptcy (Amendment) Act, 1926, in England. For our purposes the relevant English section is 45. In the English section the conditions are that the transaction should have taken place before the date of the receiver's order and that the person dealing should have had no notice of any fraudulent act of bankruptcy committed by the bankrupt before the transaction.

It will be noticed that the protection under the Provincial Insolvency Act is more extensive than under the Presidency towns Insolvency Act, and the protection under the latter Act is more extensive than under the English law. The provisions under both the Indian Acts are more in favour of persons dealing with an insolvent than those under the English law (2).

Object.—Under section 28 (7), the title of the receiver relates back to the date of the presentation of the petition, the date of the commencement of insolvency under the Provincial Insolvency Act. From the moment of the commencement of insolvency he is deprived of all powers to enter into transactions, which will bind the official assignee or receiver, in respect of his property. On adjudication the insolvent not only ceases to be the owner but is also regarded as not having been the owner from the commencement of the insolvency. The far-reaching effects of the order of adjudication on the powers of an insolvent in dealing with his property were thus stated in an English case :—

“Relation back of the title of the trustee in bankruptcy (meaning thereby the person in whom the bankrupt's estate becomes vested by the bankruptcy, by whatever name he may have been called) has existed under English statute law ever since 13 *Eliz* c. 7 ; in that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy, *i.e.* he was entitled to the possession of the bankrupt's property, such as was at that date. The effect of subsequent legislation has been, not to create, but merely to limit, this relation back until, under the Acts now in force, its period has been reduced to a maximum of three months, so that if the requisite bankruptcy proceedings are not taken within that period that act of bankruptcy ceases to be effective, and there can be no relation back to the date of that act of bankruptcy even though that bankruptcy should subsequently supervene... .. Nothing is more firmly established in Bankruptcy Law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it if it is not already in his hands, or to make payments to his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy, because the debt may, by subsequent bankruptcy proceedings, be turned into a debt due to his trustee, and not to himself. This is a principal and fundamental part of our bankruptcy administration... .. Until commission of the act of bankruptcy he was of course the beneficial owner of whatever assets he

(1) *Firm Melamal Shibdayal v. Thakardas Sud*, A. I. R. 1934 Lah. 819; 155 I. C. 1084.

(2) *Mulla's Law of Insolvency*, page 461; *Bhagwandas & Co., v. Chuttan-*
1921 43 All. 427, 431; 62 I. C. 732; A. I. R. 1921 All. 41.

possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made, the whole of the assets vests in his trustee as from the date of the act of bankruptcy. He is therefore in the position that, should such a contingency occur, he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice (1). S. 55.

The enforcement of the doctrine of relation back in all its rigour caused much hardship. In course of time it was felt that the doctrine should be limited by providing exceptions to it and by narrowing down its scope. In England the insolvency commences from the date of the commission of the act of bankruptcy on which the order of adjudication is made. Formerly the act of bankruptcy for the purposes of an insolvency petition was available for a very long time. That long period has by successive legislations been reduced to three months. That was one way in which the relation back of the trustee's title was limited. The other manner in which it was limited was by providing exceptions for the protection of persons who dealt with the insolvent *bona fide* and in ignorance of the grave financial embarrassment which had befallen the debtor by the presentation of the insolvency petition (2).

Scope.—The section deals with transactions of the nature described in its clauses (a), (b), (c) and (d), which take place after the date of the presentation of the petition and before the order of adjudication. Again, even such transactions are not protected under the section if they fall within any one of sections 51, 52 (effect of an act of an insolvency on an execution), section 53 (avoidance of voluntary transfers) and section 54 (avoidance of fraudulent preferences), by express terms of the section itself.

The protection given by the section extends to the provisions, which might otherwise have an invalidating effect on such transactions, of the Provincial Insolvency Act only. If the transaction is otherwise voidable under the general law or under section 53, Transfer of Property Act, the section does not afford any protection (3).

Again, it may be noted that the protection afforded by this section extends only to persons having dealings immediately with the insolvent. That is clear from clauses (a) to (d), which only provide for transactions to which the insolvent is a party. Thus a transferee who acquires a title through a transaction which is void as against the official assignee or receiver subsequently sells the goods to a purchaser for value without notice of the presentation of a petition, the sale is void as against the official assignee or receiver, and the purchaser does

(1) *Ponsford Baker & Co., v. Union of London & Smith's Bank, Ltd.*, 1906, 2 Ch. D. 444, *per* Fletcher Moulton, cited at page 62 of A. I. R. 1935 Rang. 61.

(2) *Official Assignee v. Mercantile Bank*, A. I. R. 1935 Rang. 61.

(3) *Radha Krishan Thakar v. Official Receiver*, 59 Cal. 1135 : 139 I. C. 323 : A. I. R. 1932 Cal. 642.

S. 55. not acquire any title under it (1). A transferee does not acquire title from a transferee of a transferor who is insolvent at the time of the transfer of Property Act (2), or under S. 54, P. I. A., 1914, or under section 54 of the Insolvency Act, 1907, requires a good title to the property acquired by the transferee.

Similarly by sub-section (2) of section 54 a transferee does not acquire value from a preferred creditor acquiring a good title to the property against the official assignee or receiver. It is indeed an anomaly that the legislature has not extended protection of the section to a transferee transferee for value from a transferee from the insolvent.

Conditions of applicability.—In order that a particular transaction may be protected under the section, the following conditions should be satisfied :—

(i) The transaction should be of the nature specified in clauses (a) to (d).

(ii) It should have taken place before the date of the order of adjudication.

(iii) That the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

If any one of the above conditions is not satisfied the section will not apply. The above three conditions are expressly provided by the section itself. There is, however, a fourth condition which the transaction should also satisfy i.e., the transaction should be *bona fide*. This condition is not laid down in the section itself but has been established in England since long and the English law on the subject has been followed in India. We shall deal with the last condition first.

The transaction must be bona fide.—The section is based on S. 49 of the Act of 1833 which is now re-enacted in S. 45, B. A., 1914. Section 49 of the Act of 1833 was substituted for sections 94 and 95 (1) of the Act of 1869, which contained the qualifying words 'in good faith'. Prior to that, section 133 of the Bankruptcy Act, 1849, contained the words '*bona fide*'. These qualifying words were omitted in section 49 of the Act of 1883 and are also omitted from S. 45, B. A., 1914. In the section of the Provincial Insolvency Act too, these words do not appear; although the words '*bona fide*' appear in the marginal note just as they do in the English section. Thus neither the English nor the Indian section expressly requires that the transactions with the insolvent should, in order to be protected, be in good faith. Still it has been held that good faith is essential for protection under the section, and if a transaction is not *bona fide*, it may be avoided as contrary to the policy of bankruptcy laws. Under section 54 a transaction can be set aside as a fraudulent preference if it takes place within three months of the date of petition. If a similar transaction takes place after the date of the presentation of the petition but before the date of the order of adjudication, it cannot be impeached under section 54 and would, if we were

(1) *Re Gunsbourg* (No. 3), 1920, 2 K. B. 426.

(2) *Harrods, Ltd. v. Stanton*, (1923) 1 K. B. 516; *Kunhu Pothu v. Raru Nair*, 1923, 46 Mad. 478; 72 I. C. 727; A. I. R. 1923 Mad. 553. In *Bastibegum v. Banarsi Prasad*, 1908, 30 All. 297, it was decided otherwise. It is not good law: *Phagoo Murao v. Tulsi Ram*, A. I. R. 1930 All. 433; *Maharaja of Faridkot v. Anant Ram*, 114 I. C. 62; 10 Lab. 447; A. I. R. 1929 Lab. 1.

(3) See commentary under section 53.

to look to the section alone, be protected. But this is not the law. It has been held in England that a payment to a creditor after a petition for adjudication had been presented, which would have been a fraudulent preference if made before the presentation, is contrary to bankruptcy laws and in bad faith, though it was made before the receiving order and though the creditor had no notice of an act of bankruptcy, and that it was not protected by section 49 of the Bankruptcy Act, 1883 (1). The ground of the decision in these cases was that the payments were not made in good faith, that they were contrary to the policy of the bankruptcy laws, that they amounted in effect to a common law fraud, and that, therefore, section 49 of the Act of 1883 did not apply (2).

A transaction which comes within this section is protected, although it is in itself an act of insolvency, provided that the party other than the insolvent acts in good faith; but it is otherwise if he acts in bad faith and is a party to the fraud on bankruptcy laws. Thus if a person sells his property with intent to defeat or defraud his creditors, as where he intends to abscond with the purchase money, it is an act of insolvency, but the buyer will be protected if he has no knowledge of or ground to suspect such intention (3). But if a creditor, knowing that there are other creditors, takes the whole or substantially the whole of the debtor's property in payment of a past debt, he is not acting in good faith, and is not entitled to the protection of this section (4). Payments made not in the ordinary course of business, but for the very purpose of doing that which in law constitutes an act of bankruptcy and would have been known both to the payer and to the recipient to constitute an act of bankruptcy, if they had adverted to the legal effect or the effects known to them, are not protected (5). Where the bankrupt had transferred all his assets and business to a company formed by himself and his nominees with an intent to defraud his creditors, it was held that the transaction was an act of bankruptcy and not protected (6). It may be noted that the English cases will not be of much help. Under the English law the commencement of the insolvency dates from the act of insolvency. Under the Provincial Insolvency Act it dates back to the presentation of the petition. The act of insolvency must have been committed before the presentation of the petition. No question can, therefore, arise where the transaction will be an act of insolvency and at the same time come within the purview of section 55. The Madras High Court has held in a case arising under the Presidency-towns Insolvency Act that where the creditor has notice of an act of insolvency, though he may not have notice of the presentation of the petition, he is not acting *bona fide*. The ground of the decision is that notice of an act of insolvency is in itself

(1) *Re Badham*, 10 Mor 252; 69 L. T. 356; *Re Slobodinsky*, 1903, 2 K. B. 517, 525; *Re Dunkley & Son*, 1905, 2 K. B. 683. In the last mentioned case the payment was held to have been made in good faith and to be protected.

(2) *Re Dunkley & Sons*, 1905, 2 K. B. 683, 686, *per* Bigham, J.

(3) *Shears v. Goddard*, 1896, 1 Q. B. 406; *Re Dunkley & Son*, 1905, 2 K. B. 683.

(4) *Re Jukes*, 1902, 2 K. B. 58.

(5) *Re Sharp*, 83 L. T. 416.

(6) *Re Slobodinsky*, 1903, 2 K. B. 517, 525.

S. 55. sufficient to render a transaction *intra vires* (1). The judgment is too far and it has been adversely criticised by Mr. Mulla in his Lectures.

The transaction must have taken place before the order of adjudication—In England it has been held that, where an appeal from the dismissal of a bankruptcy petition, the appeal was allowed, and a receiving order was made and dated as from the order of the court dismissing the petition, for the purposes of section 49 of the Act of 1883 (corresponding to the present section), the receiving order must operate from the date when it was in fact made, and not from the date it bore (2). This case was referred to and distinguished on facts in a Rangoon case and opinion was expressed that the case is not likely to be followed in India. There an order of adjudication passed by the insolvency court was cancelled by the appellate court but was again restored on further appeal; and it was practically decided there that the effect of the order passed by the second appellate court was that the date of the order of adjudication was the date on which that order was in fact passed by the insolvency court (3).

Transactions after adjudication order.—On the making of an order of adjudication the whole of the property of the insolvent vests in the receiver and the insolvent ceases to be the owner thereof. He becomes absolutely incompetent to transfer or otherwise deal with his property. No question of payment of value for the property or notice of the presentation of the petition arises. This will be so even if the payment or transfer is made in pursuance of a contract entered into before adjudication. Thus if a person after adjudication pays a sum of money to the insolvent in fulfilment of a contract entered into before adjudication, the payment is not a valid discharge (4). Where, under a contract for the sale of land entered into before adjudication, the purchaser pays the purchase money to the insolvent after adjudication, he pays the wrong person and he cannot compel the official assignee or receiver to execute a conveyance without paying the purchase money again to him (5).

A payment made to the insolvent with the consent of the official assignee or receiver during the pendency of the petition (6) or after adjudication (7) is a good discharge.

The person dealing must not have notice of the presentation of the petition.—If the person dealing with the insolvent after the presentation of the petition had notice of the petition, he is not protected (8).

(1) *Mercantile Bank of India, Ltd. v. Official Assignee, Madras*, 1916, 39 Mad. 250: 35 I. C. 942; *Official Assignee, Madras v. Valliappa Chetty*, 1922, 45 Mad. 233, 244-245: 69 I. C. 968: A. I. R. 1922 Mad. 144.

(2) *Re Teale*, (1912) 2 K. B. 367.

(3) *Official Assignee v. Mercantile Bank*, A. I. R. 1935 Rang. 61.

(4) *Miller v. Abinash Chunder Dutt*, 1897, 2 C. W. N. 372; *McEntire v. Potter and Coy.*, 1899, 22 Q. B. D. 438.

(5) *Exp. Rabbidge*, 1878, 8 Ch. D. 367.

(6) *Rajkristo Singh v. Shaikh Shelatoola*, 1874, 17 W. R. 85.

(7) *Re Wilson*, 1925, 133 L. T. 814.

(8) *Firm Mela Mal Shibdayal v. Thakar Das*, A. I. R. 1934 Lah. 819: 155 I. C. 1084 (the mortgagee had notice, though the transaction was upheld on other grounds); *Official Assignee v. Mercantile Bank*, A. I. R. 1935 Rang. 61; *Secretary of State v. S. C. Niyogi*, A. I. R. 1935 Rang. 273; *Bhagwandas and Co. v. Chhuttan Lal*, 62 I. C. 732: 43 All. 427: A. I. R. 1921 All. 41 (*obiter*; the transaction had in fact taken place before the date of the presentation of the petition); *Nanakchand Ramanand v. Official Receiver*, 143 I. C. 628: A. I. R. 1933 Sind 85; *Jinwar Gungasa Chawre v. W. B. Dawle*, A. I. R. 1936 Nag. 28; 161 L. C. 441.

Any payment made by the debtors of the insolvent to him subsequent to the date of presentation of the petition is void against the official receiver, unless the debtors prove that they had no knowledge of the petition. Where the debtors failed to appear before the court and to raise any such contention, the mere statement of the insolvent himself that when the debtors made the payment they were not aware of the petition and that they made the payment *bona fide* is not enough to establish want of notice on the part of the debtors (1).

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Burden of proving want of notice.—The onus of proving want of notice of the presentation of the petition is upon the person who relies upon such want of notice; as *prima facie*, by virtue of the doctrine of relation back, dealings of the insolvent with his property after the presentation of the petition are voidable against the receiver of the estate (2). It is for the person relying on want of notice that he should plead the protection given by the section (3). Under section 28, sub-section (2), the bar of filing suits by the creditors of an insolvent operates from the date of the order of adjudication. Till the order of adjudication is passed there is no bar also to an insolvent filing a suit against a debtor of his. In such cases if the insolvent is adjudged insolvent the title of the trustee relates back to the date of the presentation of the petition and the insolvent could not be considered as competent for giving a discharge of the debt to the defendant; the proper course for the defendant is to deposit the amount in court to remain there till the court could see who was the person properly entitled to it, the plaintiff or the trustee of the plaintiff's estate. If after suit the defendant pays the money to the plaintiff out of court, having at the time notice of the presentation of the petition by or against him, the defendant might be made to pay the amount to the receiver (4).

Clause (a); payments by the insolvent.—If the money is received with notice of the presentation of a petition the person who receives it may be compelled to return it to the receiver. Even a secured creditor is not entitled to receive the payment of his debt from his debtor and to hand over the securities, after notice of the presentation of the petition. This is because the debtor has by the presentation of the petition incapacitated himself from tendering the money and not because it is a limitation of the secured creditor's right to deal with his security (5). A payment of a lost bet by the insolvent is not protected because a lost bet does not constitute a debt and its payment is not a payment to a creditor within clause (a) of the section; nor is it a transfer for valuable consideration within clause (c), nor is it a contract or dealing within clause (d), for a contract of dealing within that clause means a

(1) *Dharamdas Thawardas v. F. O. Hukamchand Mirimal*, A. I. R. 1932 Sind 62.

(2) *Exp. Schulte*, L. R. 9 Ch. 407; *Exp. Cartwright*, 44 L. T. 883; *Ponsford Baker and Co. v. Union of London and Smith's Bank, Ltd.*, 2 Ch. D. 444; *Official Assignee v. Mercantile Bank*, A. I. R. 1935 Rang. 61; *Dharam Das v. Hukamchand*, 138 I. C. 628; A. I. R. 1932 Sind 62; *Firm Mela Ram Shibdial v. Thakar Das Sud*, A. I. R. 1934 Lah. 819; 155 I. C. 1084.

(3) *Secretary of State v. S. C. Niyogi*, A. I. R. 1935 Rang. 273.

(4) *Ponsford Baker and Co. v. Union of London and Smith's Bank*, 1906, 2 Ch. 444, as explained by the Court of Appeal in *McCarthy v. Capital and Counties Bank*, 1911, 2 K. B. 1088.

(5) *Ponsford Baker and Co. v. Union of London and Smith's Bank, Ltd.*, 1906, 2 Ch. 444.

S. 55. contract which has contractual force and which involves a legal obligation (1). There is, however, an exception to the rule that payments received by the insolvent with notice of the petition are liable to be refunded. It is when a debtor pays cash money to his solicitor for defraying legal expenses in opposing a petition for adjudication filed against him or where he pays ready money to a tradesman and buys articles of ordinary necessity from him. The exception is founded on sheer necessity (2). The exception, however, applies only to the case of ready money paid over and it is not to be extended (3). Thus a solicitor or an accountant cannot take from an insolvent a charge on his property for services to be rendered to him (4).

Clause (b); payment or delivery to the insolvent.—Though the debt vests by relation back in the receiver but if the debtor pays the amount to the insolvent under the circumstances specified in the section the debt is validly discharged by such payment (5). A banker who, having moneys of a customer in his hands, honoured the customer's cheque after notice was, held liable to pay to the trustee in bankruptcy of the customer the amount so paid (6). The giving of a post-dated cheque to the insolvent, which does not become due till after the insolvency, in good faith and for value, and without notice of the presentation of an insolvency petition by or against him, is a protected transaction. There is no obligation on the person paying to stop the payment of the cheque on receiving notice of the presentation of the petition (7).

Clause (c); transfer for valuable consideration.—The first two clauses deal with payments by or to the insolvent. Clause (c) deals with transfers of the insolvent's property by him. The transfer must be for valuable consideration and the transferee should have no notice of the presentation of the insolvency petition on the date of the transfer. Unless both these conditions co-exist, the transfer is not protected (8). The expression "valuable consideration" in this section is not to be confined to fresh consideration, but will in general include a past debt (9). Forbearance to sue is valuable consideration within this section (10). Payment of a lost bet by the insolvent is not a dealing for valuable consideration and is not protected by this section (11).

Clause (d); contract or dealing.—The contract or dealing should be for valuable consideration. The section protects a contract made without notice but it does not purport to protect any conveyance or assignment made in pursuance of a protected contract. Where, on a contract for the sale of the lease of a public house, the purchaser made a deposit to be forfeited if he should fail to complete,

(1) *Ward v. Fry*, (1900) 85 L. T. 394.

(2) See *Re Sinclair*, 1885, 15 Q. B. D. 616. *Re Johnson*, 1911, 111 L. T. 165.

(3) *Re Spackman*, 1890, 24 Q. B. D. 728; *Re Whitlock*, 1894, 1 Mans. 33.

(4) *Re Simonson*, 1894, 1 Q. B. 433, 436.

(5) *Onkarasa v. Bridhi Chand*, 73 L. C. 1037; A. I. R. 1923 Nag. 290.

(6) *Vernon v. Hankey*, 2 T. R. 113.

(7) *Exp. Rockdale*, 1811, 19 Ch. D. 409.

(8) *Firm Mela Mal Shib Dayal v. Thakar Das Sud*, A. I. R. 1984 Lah. 819.

(9) *Re Jukes*, 1902, 2 K. B. 58, 58; *Re Dunkley & Son*, 1905, 2 K. B. 683.

(10) *Re Wethered*, (1926) Ch. 167; 134 L. T. 264.

(11) *Ward v. Fry*, 1900, 85 L. T. 394.

and before completion the vendor committed an act of bankruptcy of which the purchaser had notice, and the latter refused to complete, it was held that the deposit could be recovered back, the reason being that the payment of the balance of the purchase money would not have been protected (1). The following transactions have been held to come within the meaning of the word 'dealing':—

S. 55.

(i) A lien (2).

(ii) A seizure of goods under an irrevocable licence to seize them (3).

(iii) Taking possession under a bill of sale or notice to the party liable, so as to take a trade debt out of the order and disposition of the assignor, is a dealing (4). A mere demand of possession made on the bankrupt by the true owner is a dealing (5).

(iv) Payment by a person indebted to the bankrupt to a third party on the instructions of the bankrupt, even though the instructions given by the bankrupt do not amount to an equitable assignment of the debt (6).

(v) Where a building contract gave the owners power in certain events, of which bankruptcy or insolvency were two, to enter and complete the work after notice, and to seize the materials, a seizure made after the filing of a liquidation petition was held a protected transaction (7).

The following transactions have been held as not coming within the section. It has been held that "contract or dealing" means something done by the bankrupt and not a proceeding in which the bankrupt is merely passive. Thus a charging order under the Judgment Act, 1838, section 14, upon stock, shares or money in court of the judgment-debtor (8), an order charging the share of a bankrupt partner under the Partnership Act, 1890, S. 23 (9), and a garnishee order attaching a debt, payment not having been obtained (10), do not come within the meaning of the words. Following these decisions it has been held by the Madras High Court that the filing of a suit for specific performance of an agreement to execute a mortgage and the obtaining of a decree, even though by consent of a judgment-debtor or by withdrawal of defence, do not come within the expression "contract, dealing or transaction" done by the judgment-debtor (11). The question whether a distress is a transaction within the meaning of the section is an open one (12).

(1) *Powell v. Marshall*, Parkes and Co., 1899, 1 Q. B. 710.

(2) *Bowman v. Malcolm*, 11 M. & W. 833; *Young v. Hope*, 2 *Ex.* 105; *Exp. Styau*, 2 M. D. & D. 219; *Green v. Bradfield*, 1 C. & K. 449.

(3) *Krehl v. Great Central Gas Co.*, L. R. 5 *Ex.* 289.

(4) *Graham v. Furbur*, 14 C. B. 134; *Rutter v. Everett*, 1895 2 Ch. 872. (A mortgagee of book debts had given notice of the assignment to the debtors, not having notice at the time of any act of bankruptcy committed by the mortgagor).

(5) *Exp. Wright*, 3 Ch. D. 70.

(6) *Re Gunsbourg*, 88 L. J. K. B. 479.

(7) *Re Waugh*, 4 Ch. D. 524.

(8) *Re O'Shea's Settlement*, 1895, 1 Ch. 325.

(9) *Wild v. Southwood*, 1897, 1 Q. B. 317.

(10) *Exp. Pillers*, 17 Ch. D. 653.

(11) *Mulukutla Atchuta Ramayya Garu v. Official Receiver, East Godavari*, A. I. R. 1935 Mad. 817.

(12) *Lackington v. Elliot*, 7 M. & G. 538.

Realisation of Property.

S. 56.

56. (1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

(a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property; and

(b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof:

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the balance due from him thereon as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

(5) The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20.

History.—This is section 18 of Act III of 1907, except sub-section

(5). In the old Act there was no express provision for the appointment

of an interim receiver of the insolvent's property. In the present Act such provision is now made in section 20 and the present sub-section is added to assimilate the exercise of powers and functions by the interim receiver to that of a receiver appointed under the section after adjudication. S. 56
(1).

Analogous law.—Provision is made in S. 77, Presidency-towns Insolvency Act, for the appointment and removal of an official assignee of an insolvent's estate. In England a trustee in bankruptcy and an official receiver are two persons who are concerned with insolvency. The trustee in bankruptcy exercises functions very similar to that of a receiver or of an official receiver under the Provincial Insolvency Act. He is appointed by the creditors of the insolvent and has to act generally under the directions of the committee of inspection. See S. 19, B. A., 1914. The official receiver is appointed under section 70, B. A., 1914, and his status is defined in section 72 and the subsequent sections. In India there is no institution corresponding to that of the official receiver in England, whose main concern is to investigate into the conduct of the insolvent and to report to the court. In the absence of the appointment of a trustee or before the order of adjudication, the official receiver performs the functions of the trustee or the interim receiver, as the case may be.

Object.—In every system of law for the realisation and distribution of a bankrupt's property there is an official, called an assignee or trustee or by any other name, and that official is by force of the statute invested with the bankrupt's property (1). By passing the order of adjudication the insolvency court takes upon itself the task of administering the estate of the insolvent. Administration consists mainly of realization of the debtor's property and distribution of the assets amongst his creditors. The receiver occupies a double position. In the first place, he becomes the owner of the debtor's property and represents the insolvent's estate in all matters. In the second place, he represents the general body of creditors and in that capacity he has certain rights against the insolvent, strangers to the insolvency etc., in the matter of getting transfers set aside and other matters.

Time for appointment of receiver.—Under section 28 (2), on the making of an order of adjudication, the insolvent's property vests in the court or in the receiver. The section contemplates the appointment of a receiver at the time when the order of adjudication is made. And ordinarily these two orders are passed at one time. But if no receiver is appointed at the time of the order of adjudication, it may be done at any time afterwards. In a Calcutta case, an application for the appointment of a receiver was made seven years after the order of adjudication, and it was granted (2). The vesting of the insolvent's property is, however, not kept suspended till the appointment of the receiver, as it vests in the court under section 28 (2).

Again, the section contemplates that the receiver appointed under the section shall be a receiver for the whole of the insolvent's property and not of a part only (3).

(1) *Sheobaran Singh v. Kulsum-un-Nissa*, 49 All. 367 (P. C.): 101 I. C. 368; A. I. R. 1927 P. C. 113.
 (2) *Haromohan v. Mohan Das*, 83 I. C. 360; A. I. R. 1924 Cal. 849.
 (3) *N. M. S. Chetty Firm v. The Bailiff of District Court*, 89 I. C. 61; A. I. R. 1925 Rang. 224.

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(1).

Such property shall thereupon vest in such receiver.—As soon as a receiver is appointed, the property of the insolvent vests in him. An order of appointment and vesting is necessary; till the vesting order is made, the property remains vested in the court and the receiver cannot give a valid title by a sale to his vendee (1). It is immaterial that the receiver appointed is an official receiver. The vesting order, however, need not be express. It may be implied. Where the court passed an order of adjudication and referred the insolvency petition to the official receiver for further proceedings, it was held that the proceedings referred to in the order may not necessarily mean judicial proceedings only and that a vesting order was impliedly made (2). In another case the order passed was: "the petition is transferred to the official receiver for adjudication and for the administration of the estate." In due course the official receiver passed an order of adjudication but no separate order was passed by the district judge vesting the property in the official receiver. He assigned some of the properties to a third person. It was held that the assignment was valid and that the order passed by the court had the effect of vesting the property in the official receiver (3). A similar order was, however, not so construed in a subsequent Madras case (4). Where before an order vesting the property in the receiver is made the receiver sells the property, and the court subsequently makes an order vesting the property in the receiver, it was held that the vendee's title to the property becomes complete either on the principle of ratification or under section 43 of the Transfer of Property Act (5). The whole matter was considered by a full bench of the Madras High Court. It laid down the following propositions:—

(i) A sale by the official receiver is void when no vesting order has been passed.

(ii) Where the sale takes place before the vesting order, which is subsequently passed, the official receiver is not an agent of the court transferring an application for disposal within the meaning of the Contract Act so as to enable the court to ratify any unauthorised acts done by the agent.

(iii) A sale by the official receiver of the insolvent's property is not a transfer contemplated by S. 2, Transfer of Property Act. Section 43 applies where the receiver has sold the property before the vesting order in his favour is made, and the sale is subsequently ratified by the court (6).

(1) *Muthu Swami Swamiar v. Samoo Kandiar*, A. I. R. 1920 Mad. 790: 43 Mad. 839; 59 I. C. 507; *Official Receiver of Trichinopoly v. Soma Sundram Chettiar*, A. I. R. 1917 Mad. 102; 34 I. C. 612; *Vythilinga Padaichi v. Ponnusami Padaichi*, 62 I. C. 396; A. I. R. 1921 Mad. 612.

(2) *Sankara Narayana Pillai v. Raja Mani*, 83 I. C. 196; 47 Mad. 462: A. I. R. 1924 Mad. 550.

(3) *Subaiyar v. Ramaswamy Aiyangar*, 62 I. C. 346; 41 Mad. 547: A. I. R. 1921 Mad. 216.

(4) *K. Sankara Rao v. Rama Krishanyya*, 78 I. C. 294: A. I. R. 1924 Mad. 461.

(5) *G. Narassimulu v. Bassava Sankaram*, 85 I. C. 439: A. I. R. 1932 Mad. 249.

(6) *Bassava Sankaram v. Narasimhulu*, 99 I. C. 8: 50 Mad. 135: A. I. R. 1927 Mad. 1 F. B. See also *Muthiah Chettiar v. Doraiswami Pillai*, A. I. R. 1927 Mad. 1091; 105 I. C. 793, where the full bench ruling was followed.

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(3).

Receiver's remuneration.—Subject to the rules framed by the High Court under section 79, the question of remuneration of the receiver is to be determined by the court (1). A receiver is entitled to a lien for the amount of his commission on the net assets remaining after payment of all charges (2). The right of the official assignee to commission does not arise until there are funds in his hands realised and available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists (3). In the case of mortgaged property what vests is the equity of redemption and it is the value of the equity of redemption only which can properly be called an asset available for distribution. Where, therefore, a mortgaged property is sold by the receiver free from encumbrances and the latter are paid off, the receiver is entitled to remuneration on the amount remaining after deducting the amount paid to the mortgagee or encumbrancer (4). Burma Court Manual, para. 307 (a) (1) (5), and a notification of the C. P. Government (6) and rule 16 of Chapter 23 of the Manual of Circulars issued by the Bombay High Court (7) have also been interpreted in the same sense. In U. P., the matter is regulated by U. P. Government notification No. 60,—VII—247, dated May 20, 1925, where the words 'gross assets' are used. The expression has been interpreted to mean the entire amount realised by the official receiver, irrespective of whether the whole was distributable or not among the creditors (8). Following this ruling the same High Court has held that the receiver is entitled to commission on the entire sale proceeds of the property sold free from a prior mortgage and not only on the value of the equity of redemption (9). In a subsequent Allahabad case, where the facts were slightly different, it was held that the commission should be given on the balance after deducting the mortgage amount (10).

Sub-section (3); meaning of property.—Where a third person, who has been placed in a position to realise certain decretal amounts on behalf of another upon the understanding that the money realised should be held for the use of the original creditor, embezzles the said money, he places himself under a legal liability to recoup the amount. The liability springs from a tortious breach of an obligation and the breach is actionable. The liability of such a person to recoup the money cannot be treated as amounting to his being in possession or custody of any property belonging to the insolvent, and the insolvency court has no jurisdiction to

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- (1) *Prokashchandra v. Adlam*, 30 Cal. 696.
 - (2) *Mahadeb v. Kuppuswami*, 15 Mad. 233.
 - (3) *Official Assignee v. Ramalinga*, 8 Mad. 79.
 - (4) *Sridhar v. Atma Ram*, 7 Bom. 455; *Sridhar v. Krishnaji*, 12 Bom. 272; *Sheoraj Singh v. Gouri Sahai*, 21 All. 227; *In re Official Assignee's Commission*, 36 Cal. 990.
 - (5) *R. M. M. Chettiar Firm v. U. Hla Bu*, 106 I. C. 200; 5 Rang. 623; A. I. R. 1928 Rang. 23, (decided on general principles and earlier authorities); *K. P. S. P. L. Firm v. C. A. P. C. Firm*, 7 Rang. 126; 117 I. C. 582; A. I. R. 1929 Rang. 168; *Mg. Po Yeik v. Power*, A. I. R. 1934 Rang. 112; 150 I. C. 960.
 - (6) *Govind v. Abdul Kadir*, 71 I. C. 558; A. I. R. 1923 Nag. 150.
 - (7) *Venkatesh Balwant Joshi v. B. S. Jorapur*, 90 I. C. 561; 27 B. L. R. 1109; A. I. R. 1925 Bom. 472.
 - (8) *Official Receiver, in re*, 130 I. C. 695; A. I. R. 1931 All. 94.
 - (9) *David v. Judge*, Small Causes, Cawnpore, 133 I. C. 607; A. I. R. 1931 All. 723.
 - (10) *Official Receiver, in re*, 140 I. C. 111; A. I. R. 1932 All. 260.

- S. 56** initiate proceedings against such third person in the case of insolvency
(3). of the original decree-holder, in order to recover money due from him for breach of an obligation to the insolvent (1).

Sub-section (3) ; court's power to remove a person from possession.—The court alone has the power conferred by the sub-section. The receiver has no such power. A receiver is not a judicial officer and he cannot make a judicial inquiry (2). It is not for the receiver to decide as to whether action should be taken under the sub-section or not. It is primarily for the court to decide that question. The court may, however, direct an administrative enquiry by the receiver for the purpose of informing its mind, but the court should not accept the report without itself considering the matter, and should decide for itself as to whether action should be taken under the section or not (3). The receiver has no power to make an order against debtors of the insolvent. He can call upon them to pay what they owe to the insolvent, but, if they do not pay, he must seek his remedy by suit (4).

Even the court cannot order an alleged debtor of the insolvent to pay into court the balance due after holding inquiry. The powers of the court in the matter are those of a receiver as defined in S. 50, P. L. A., 1907 (5).

Sub-section (3) ; proviso.—Under the sub-section, the court has been given the power of removing any person from the possession of the property of the insolvent. But this power of removal is subject to the limitation given in the proviso. It was held under the old section that the court has not got a right to remove a person who claims adversely to the insolvent, as it cannot be said that the insolvent has a right to remove (6). The only remedy of the insolvent would have been, but for his insolvency, to institute a regular suit for the recovery of that property. In other words, the question which arose for determination by the court was as to whether the court, acting under section 56, sub-section (3), had power to inquire into and decide questions of title arising between the insolvent's estate and persons claiming adverse to it. The result was a conflict of decisions. It was held by the Allahabad High Court that the court had that power (7). The Calcutta High Court took a different view. It held that, when the benami character of the title is admitted or when the veil is transparent and the insolvent is in substantial beneficial possession, the court may order the delivery of the property to the receiver, but

(1) *Salig Ram v. Lachmi Prasad*, A. I. R. 1930 All. 622; 131 I. C. 525.

(2) *Nilmoni Chowdhury v. Durga Charan Chowdhury*, A. I. R. 1919 Cal. 965; 46 I. C. 377; *Gobardhan Das v. Jagat Narain*, 94 I. C. 506; A. I. R. 1926 Pat. 291.

(3) *Nilmoni Chowdhury v. Durga Charan Chowdhury supra*; *Meenakashi Ammal v. Rama Aiyar*, 1914, 37 Mad. 396; A. I. R. 1914 M. 587; 18 I. C. 34; *Sant Prasad Singh v. Sheodat Singh*, 2 Patna 724; 77 I. C. 583; A. I. R. 1924 Patna 259.

(4) *Moses Menahim v. Ahraim Solomon*, 1923, 17 Bom. 548; 84 I. C. 684; A. I. R. 1923 Bom. 233.

(5) *Govind v. Gopala*, 22 I. C. 69.

(6) *Sanyasicharan v. Ashutosh Ghose*, A. I. R. 1915 Cal. 482; 42 Cal. 225; 26 I. C. 886; *Pulaniappa Mudali v. Official Receiver of Trichinopoly*, 35 I. C. 610; A. I. R. 1917 Mad. 414.

(7) *Bansidhar v. Kharagjit*, 37 All. 65; 26 I. C. 926; A. I. R. 1914 All. 220 (2); *Jagrup v. Ramanand*, 39 All. 633; 40 I. C. 373; A. I. R. 1917 All. 373.

where the alleged benamidar is in possession claiming adversely to the insolvent and the question of title is seriously in dispute, the only course left for the insolvency court is to direct the receiver to enforce his right by a suit in the regular courts (1). The Madras High Court took the same view as the Allahabad High Court. In a case where after the date of adjudication the insolvent's property was sold in execution of a decree against insolvent, it held that the insolvent court had jurisdiction to declare the sale invalid and order delivery of the property to the official receiver. It further held that the mere fact that there has been a court sale is not a ground for holding that the insolvent has no present right to the property (2). The above conflict of opinion has now been set at rest by the enactment of section 4 in the Act V of 1920. Under that section the insolvency court has been given very wide powers for deciding questions of title arising out of insolvency proceedings. Under the present Act it has now been held that the court cannot and should not proceed under the proviso to the present sub-section where the person in possession of the property sets up a title adverse to the insolvent. The court, however, may, on a proper application being made under section 4 of the Act, try the issue whether the insolvent is entitled to the property or not; and in doing so it shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction (3).

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(3).

When an order is passed under section 56 (3), it does not determine the rights of the parties and, though the judge may incidentally determine the question, yet it cannot be said that the question is finally determined (4). The unsuccessful claimant whose property is seized by the insolvency court or the receiver is not debarred from bringing a regular suit to establish his title (5). In certain insolvency proceedings, certain property, which was claimed by the receiver as belonging to the insolvent, was objected to by the person in possession of the same but his objection was dismissed in default of appearance. Subsequently the receiver sold the property and the purchaser applied for possession of the same to which the objector of the former occasion had objected. The court ordered delivery of possession without going into the question of title on the ground that the objection had been dismissed on a former occasion. It was held that the objectors were not bound to object in the insolvency court and that they could have retained possession of the house and ignore the insolvency proceedings and the action of the receiver. It was remarked :—

“If they had taken up that attitude, it should have been incumbent on the purchaser from the receiver to indicate his right and to obtain a decree for possession against the appellants. On the latter taking the initiative in the matter, the insolvency court should have taken action under section 4 and decided the disputed question of title once for all. In the absence of an authoritative adjudication of the rights of the con-

(1) *Nilmoni Chowdhury v. Durgacharan Chowdhury*, A. I. R. 1919 Cal. 965; 46 I. C. 377; *Satya Kumar Mukharjee v. The Manager, Benaras Bank, Ltd.*, 46 I. C. 335; A. I. R. 1919 Cal. 970.

(2) *Mahomed Hasan Tharagan v. Sankaralinga Mudaliar*, 62 I. C. 495; 44 Mad. 524; A. I. R. 1921 Mad. 204.

(3) *Chintamal v. Ponnusami Naicker*, 92 I. C. 573; 49 Mad. 762; A. I. R. 1926 Mad. 363; *Gobardhan Das v. Jagat Narain*, 94 I. C. 506; A. I. R. 1926 Pat. 291; *Dwarka Prasad v. Sunder*, 155 I. C. 1037; A. I. R. 1935 All. 546.

(4) *Chintamal v. Ponnusami Naicker* *supra*.

(5) *Ram Piyara v. Bhanamal*, 61 I. C. 332; 2 Lah. 147; A. I. R. 1921 Lah. 58; *Basodi v. Lala Mahanand Rao*, 42 I. C. 799; A. I. R. 1917 Nag. 149.

- S. 56.** testing parties, the insolvency court was not justified in treating the property as belonging to the insolvents only because the appellants had not pressed their objections on a certain occasion ; before the question of title is decided either by a decree in a separate suit or by an order under S. 4, Insolvency Act, the appellants could not be dispossessed from the property, which to all appearances they claimed in perfect good faith to be their own" (1)

Similarly, where the transaction is one which is liable to be annulled under section 53 or 54, the court has no authority to order delivery or possession of such property to the receiver without taking regular proceedings under those sections (2).

Scope of the proviso.—This proviso is in almost the same terms as O. 40, r. 1 (2) of the Code of Civil Procedure, 1908, which relates to the power of a receiver appointed by a civil court. Order 40, rule 1 (2), provides that "nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove." It shows that the power of the receiver under the proviso is limited to the same extent as that of the official assignee under the Presidency-towns Insolvency Act or a receiver appointed under the Code of Civil Procedure (3). It has reference to cases where a person is in possession under a lease or a usufructuary mortgage from the insolvent (4). It may be illustrated by the facts of a case. A presented an insolvency petition against B ; the insolvency court acting under section 20 appointed the official receiver as an *interim* receiver and directed him to take possession of the property in dispute. This property had however been already mortgaged with possession by B to C and was being held by B, under a deed of lease from C, the mortgagee. The *interim* receiver dispossessed B and took possession of the property. C put in an application in the insolvency court that, as he was a mortgagee in possession, the *interim* receiver should be called upon to make over the possession of the property in dispute to him. The court passed an order to the effect that, inasmuch as B was the tenant of the mortgagee, the receiver shall restore the possession of the property in dispute to C. It was held in appeal that B enjoyed two different rights in the property mortgaged. He was the owner of equity of redemption as well as the occupant of the property by virtue of his lease which was co-terminus with his mortgage. So far as his equity of redemption was concerned, it did not admit of physical possession, but his leasehold was capable of such possession and could be taken possession of by the receiver, and the order restoring the possession to the mortgagee was wrong (5).

Again, the insolvent has no right to remove from possession a receiver appointed in a mortgage suit. As the possession of the receiver appointed in the suit is on behalf of the mortgagee and for his benefit

(1) Dwarka Prasad v. Mst. Sundar, A. I. R. 1935 All. 546 : 155 I. C. 1037.

(2) N. N. S. Chetty Firm v. The Bailiff of District Court, 89 I. C. 61 : A. I. R. 1925 Rang. 224.

(3) Section 58 (2), Presidency-towns Insolvency Act.

(4) Kochu Mahomed Hasan Tharagan v. Sankaralinga Mudaliar, 44 Mad. 544 : 62 I. C. 393 : A. I. R. 1921 Mad. 102.

(5) Nrisinha Kumar Sinha v. Deb Prosanna Mukherjee, A. I. R. 1935 Cal. 460.

and not for the insolvent (1). The receiver of an insolvent member of a joint hindu family is not entitled to exclusive or joint possession of any portion of the joint hindu family property. The court should in such a case refer the receiver to a suit because, even if it decides the question of title under section 4, it cannot order delivery of possession under section 56 (3) (2). S. 56
(4).

Purchaser from receiver.—Under the Act 3 of 1907, it was held that where a purchaser from the receiver in insolvency applied to the court for delivery of possession to him and a stranger objected, it was not competent for the insolvency court to hold a summary inquiry on the lines of O. 21, rr. 97 and 98, C. P. C., and order delivery of possession (3). Those cases were decided on the ground that under section 20 (corresponding to the present section) the court had no jurisdiction to decide claims of third parties. It appears that the cases would have been decided in the same way had the receiver himself, and not a purchaser from the receiver, applied. Under the present act it is a different matter. The questions of title can be decided by the insolvency court and once it is found in a proper proceeding that the property belongs to the insolvent and is afterwards sold by the receiver, the purchaser can apply for delivery of possession to him under the section. The terms of the clause are quite general and it is not limited to the case of an application by the receiver himself and nobody else (4).

Sub-section (4) ; powers of court over the receiver.—The receiver is an officer of the court and is appointed by it. The court has power to dismiss the receiver appointed by it. The power of appointment carries with it the power of dismissal (5). He is a trustee for the creditors and, if he has withheld sums which properly belonged to the creditors, his conduct can be, and should be, inquired into by the court at any time. There is no question of limitation (6). It is competent even to a stranger to bring the conduct of the receiver, in having acted in excess of his authority to the notice of the court and the court should make an appropriate order so that the stranger may not be prejudiced by unlawful acts of its own officer (7). As soon as the court finds that the receiver has been wrongly given possession, or ought not to remain in possession, the court should direct him to give possession to the proper person (8). The receiver is liable to render accounts for all sums received or spent by him. The mere fact that a particular amount has been passed by the insolvency court is no bar to the court's power for

(1) *Lachhi v. Badri Parshad*, 156 I. C. 278 : 36 P. L. R. 205 : A. I. R. 1934 Lah. 1006.

(2) *Official Receiver, South Arcot v. Perumal Pillai*, 79 I. C. 322 : A. I. R. 1924 Mad. 387.

(3) *Narasingha v. Virasghavahi*, 41 Mad. 440 : 42 I. C. 525 : A. I. R. 1918 Mad. 702 ; *Maddipodi Peramma v. Gandrappu Krishmayya*, 47 I. C. 308 : A. I. R. 1919 Mad. 595.

(4) *Ramaswami Chhettiar v. Ramaswami Aiyanger*, Official Receiver, 65 I. C. 394 : 45 Mad. 431 : A. I. R. 1922 Mad. 147 ; see also *Minatoolnessa Bibhee v. Khatoonessa Bee*, (1894) 21 Cal. 479.

(5) *Ram Chandra v. Rakhal*, 20 I. C. 157 : 41 Cal. 19.

(6) *Mg Po Yeik v. Power*, A. I. R. 1934 Rang. 112 : 150 I. C. 930 ; *Hanseswar v. Rakhal*, A. I. R. 1914 Cal. 835 : 20 I. C. 683.

(7) *Hanseswar v. Rakhal* *supra*.

(8) *Nagoba v. Zinzarde*, A. I. R. 1929 Nag. 338 : 121 I. C. 54.

- S. 56** re-opening the accounts at a later stage and making the receiver to refund
(5). what he has taken without justification (1).

Otherwise too the receiver is under the general control of the court. Under section 68 an appeal lies to the court from an act or decision of the receiver and the court has very wide powers to confirm, reverse or modify the act or decision complained of, and make such order as it thinks fit. The provision of appeal from the receiver's acts is not the only way in which the doings of the receiver are brought under review by the court. The court has an inherent jurisdiction in the matter and it can take action on the application of a person even when the period of limitation prescribed under section 68 has expired (2). Where a receiver entered into secret agreements with the parties without the agreements being brought to the notice of the court and where the effect of the agreements was to restrict and control his power as receiver, it was held that the parties concerned in making the agreements were guilty of gross contempt of court for which they were each and all liable to committal (3). It is improper for a receiver to bid or purchase a property belonging to the insolvent and the court ought not to sanction such a purchase (4).

The receiver in bankruptcy in whom the property of the insolvent vests is in the position, for all practical purposes, of a trustee on behalf of the creditors. If the official receiver negligently allows property to be usurped by others, which ought to be and might have been available for payment to the creditors, any of the creditors will be at liberty to file a suit for the recovery of the property so usurped (5).

Sub-section (5).—The receiver appointed after adjudication does not stand in the shoes of the *interim* receiver, appointed before the order of adjudication, but stands on a higher footing. The property of the judgment-debtor vests in him; he holds it for the benefit of the whole body of creditors and he has special rights conferred and special duties imposed upon him by a statute. One of such rights is the right to make an application under S. 36, P. I. A., 1907. An order, therefore, as to the validity of a transaction obtained upon an application to which the debtor and creditor alone are impleaded as parties while the debtor's estate is in the custody of an *interim* receiver, does not operate as *res judicata* against the receiver appointed after the order of adjudication and does not debar him from making an application under S. 36, P. I. A., 1907 (6). An *interim* receiver is for the protection of the estate and he holds the property as an agent of the court which appoints him, to act subject to its directions in regard to the management of the property. The receiver appointed after adjudication is in law the owner of the property. The object of enacting the sub-section is to make the powers and functions of an *interim* receiver and the receiver appointed after adjudication the same, so far as it is possible, having regard to their different legal status.

(1) *David v. Judge*, (Small Causes, Cawnpore, 133 I. C. 607: A. I. R. 1931 All. 723.

(2) *Hanseswar v. Rakhal*, A. I. R. 1914 Cal. 885: 20 I. C. 683.

(3) *Manik Lal v. Sarat Kumari*, 22 Cal. 648.

(4) *Ram Kamal v. Bank of Bengal*, 5 C. W. N. 91.

(5) *Pappanaickenpalayampudur Rawa Vilas Nidhi, Ltd. v. Perannaicken*, A. I. R. 1936 Mad. 161: 59 Mad. 770: 161 I. C. 723.

(6) *Ram Saran v. Shiva Prasad*, 58 I. C. 782: A. I. R. 1920 Pat. 286.

Status of the receiver.—The receiver occupies more than one position in relation to the insolvent's estate. So far as the insolvent is concerned, the receiver completely represents him under the law in respect of his properties and the insolvent has no *locus standi* to maintain an application under section 28 (2) to have a sale of his properties in execution of a decree avoided (1). In another respect, he represents the general body of creditors and has rights and duties against the insolvent and other persons claiming through him (2). A decree against the insolvent is not binding on him (3); and he is not an agent of the insolvent to acknowledge a debt due from the insolvent within the meaning of S. 19, Indian Limitation Act (4).

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(1).**

Contempt of court—Under the Presidency towns Insolvency Act, the High Courts established by Letters Patent and the Court of the Judicial Commissioner of Sind have powers to punish for contempt of court in matters specified in that Act (5). No such power has been conferred upon courts exercising jurisdiction under the Provincial Insolvency Act, nor such court has any inherent jurisdiction to commit for contempt. It is conceived that the Contempt of Court's Act, 1926, applies to disobedience of orders of these courts also.

Suits by or against a receiver.—See section 59.

Sale of the insolvent's property by a receiver.—See section 59.

Receiver's liability for costs in legal proceedings—See section 59.

Appeal.—An order authorising a receiver appointed by court to remove any person in possession of property is appealable under section 75. If the order is made by a court subordinate to the District Court an appeal lies to the District Court. Where the order is made by the District Court in the exercise of original insolvency jurisdiction, an appeal lies to the High Court under section 75 (3), by leave of the District Court or of the High Court. An appeal does not lie against an order passed by the official receiver appointed under the Provincial Insolvency Act directly to the High Court. An appeal lies to the District Court under section 22 (corresponding to S. 68, P. I. A., 1920) against an order passed by the official receiver appointed under that Act, and the right of appeal under S. 22, P. I. A., 1907, is not confined to orders comprised in sections 18, 19 and 20, P. I. A., 1907, but extends to all orders of the official receiver (6).

57. (1) The Local Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers under this Act within such local limits as it may prescribe.

(1) Fani Bhushan v. Shashi Bhushan Maity, A. I. R. 1935 Cal. 391.

(2) *Ex parte* Butters, *in re* Harrison, (1880) 14 Ch. D. 265; Ajodhia Prasad v. Bahu Sita Ram, A. I. R. 1931 Oudh 405: 134 I. C. 1013.

(3) Mir Shammat Ali v. Rahim Bakhsh, 84 I. C. 1008: A. I. R. 1923 All. 33 (i).

(4) Currim Bhai v. Ahmed Ali Lukmanji, A. I. R. 1933 Bom. 91: 143 I. C. 698: 58 Bom. 505.

(5) S. 98, P. I. A.

(6) Chidambaram Chetty v. Nagappa Chetty, 24 M. L. J. 73: 16 I. C. 820: 38 Mad. 15.

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(2)(3)
(4).

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs.

(3) Any sum payable under clause (b) of sub-section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Local Government may direct.

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Local Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such.

History and analogous law.—This is section 19 of the Act III of 1907. For analogous law, see the same heading under section 56

Appointment of official receivers.—The appointment of official receivers is left entirely in the hands of the Local Government. It may be advisable in some cases and in some circumstances to have officials to act as receivers in order that insolvency matters may be thoroughly investigated (1).

Sub-section (2); vesting of property in official receivers.—See commentary under section 56.

Unless the court for special reasons otherwise directs.—Where there is an official receiver appointed for the local limits of the jurisdiction of an insolvency court, he shall ordinarily be appointed a receiver or an *interim* receiver in all insolvency cases. All insolvencies should be kept within the control of the official receiver unless very exceptional reasons, such as reasons connected with the personality of the receiver, are put forward to deprive him of that control. The words "otherwise directs" refer not only to the point of time when the appointment of a receiver under section 56 is made but also to the period subsequent to the appointment. That is to say, the court may not only at the initial stage appoint a special receiver for valid reasons, but also it may, if good grounds are shown, remove the official receiver appointed originally at any time whatsoever (2).

Distinction between an official receiver and an ordinary receiver.—Under section 80 of the Act certain powers of the court, specified in that section, can be delegated to an official receiver but not to an ordinary receiver. But by the fact that the official receiver may have powers of the insolvency court in certain matters, he does

(1) Viceregal Council Proceedings to Act III of 1907.

(2) Official Receiver, Tanjore v. Nataraja Sastragal, 72 I. C. 225: 46 Mad. 405 : A. I. R. 1923 Mad. 355.

not become a civil court and an appeal would lie from his decisions to the insolvency court (1). **S. 58.**

Sub-section (4); official receiver's remuneration.—The remuneration of an official receiver is fixed by the Local Government to be paid out of the fund prescribed under sub-section (3). For other cases see commentary under section 56.

Secretary of State for India in Council is not liable for the acts of the official receiver.—It has been held by the Allahabad High Court, after an exhaustive discussion of the subject, that the Secretary of State for India in Council is not liable on a contract made by the official receiver (2).

58. Where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act.

Powers of Court if no receiver appointed.

History.—This is section 23 of the Act III of 1907.

Analogous law.—There is no similar provision in the English or the Presidency-towns Insolvency Acts. Under S. 17, P. I. A., and under S. 18, B. A., of 1914 (These are sections corresponding to section 28 (2), P. I. A., 1920, making provision for the making of an order of adjudication and the vesting of the insolvent's property), the property of the insolvent divisible amongst his creditors vests in the official assignee and the trustee respectively. The language of section 28 (2) is somewhat different. It is provided therein that the whole of the property of the insolvent shall vest in the court or in a receiver as hereinafter provided. Section 56 contemplates cases where the receiver may be appointed even after the order of adjudication is made and, in cases of summary administration under section 74 clause 2 (ii), the property of the debtor vests in the court as a receiver. Section 58 is enacted in the act to meet those cases where an order of adjudication divests the insolvent and the property vests in the court because no receiver has been appointed or is required to be appointed (3). In many sections of the Act, it has been given that the receiver may exercise certain powers, without mentioning the court. They should be read with the section in cases where no receiver has been appointed.

Powers of the court under the section.—The court may exercise all the powers of a receiver. It can itself seize goods alleged to have belonged to the insolvent and can release the same on an objection made by a stranger that they belonged to him (4). It can itself move for annulment of a transfer under section 53 or 54 of the without mentioning the court. They should be read with the section in cases where no receiver has been appointed.

(1) *Beardsel & Co. v. Abdulgani*, 37 Mad. 107; 14 I. C. 593; *Chidambaram Chetty v. Nagappa Chetty*, 16 I. C. 820; 38 Mad. 15.

(2) *Ram Shankar v. Secretary of State for India in Council*, 1932 A. I. J. 842; *Secretary of State v. Chand Mal*, A. I. R. 1936 All. 89; 160 I. C. 1025.

(3) *Kalachand v. Jagannath*, 54 Cal. 595; 54 I. A. 190; A. I. R. 1927 P. C. 108; 101 I. C. 442; *Narasimulu v. Basava Sankaram*, A. I. R. 1925 Mad. 249; 85 I. C. 439; *Haromohan v. Mohandas*, 39 C. L. J. 433; A. I. R. 1924 Cal. 849; *Gobind Das v. Karam Singh*, 40 All. 197; 43 I. C. 672; *Govind v. Gopal*, 18 I. C. 826.

(4) *Bali v. Nand Lal*, 33 I. C. 773.

S. 59. Act (1). The court can sell the estate itself or through an agent appointed by it and the sale by the agent will be valid when subsequently ratified by the court (2). We shall see under section 59, clause (a), that the sale of the property of a debtor by the receiver stands on the footing of a private sale and that the provisions of O. 21, C. P. C., do not, by virtue of section 5 of the Act, apply to it. The question arises as to whether those provisions apply when the sale is conducted by the court in the absence of any receiver appointed under the Act. It has been held by the Nagpur Court that, when the court exercises the functions of a receiver under the present section, it acts as a court and not in the character of a receiver. It has, therefore, held that where a court, acting under the provisions of the Provincial Insolvency Act, re-sells the property of an insolvent owing to the failure of the auction-purchaser to complete the deposit of the purchase money, and the price realised at the re-sale falls short of the price for which it was originally knocked down, the court has power to call on the defaulting auction purchaser to pay the amount of the difference and to recover such amount under O. 21, r. 71, C. P. C. (3). It is submitted that if the principle underlying the Nagpur ruling is extended to its logical length, it is likely to lead to very serious results which were, it is submitted with respect, not contemplated by the legislature. The object of getting the property vested in the court and not appointing a receiver is to shorten the insolvency proceedings. If the sale of the insolvent's property by the court is to be governed by O. 21, C. P. C., that object will be defeated.

Miscellaneous.—Where an order for costs is made against creditors and in favour of the insolvent, and at the time there is a receiver appointed of the insolvent's property, on the death of the receiver, if no other receiver is appointed, the insolvent's estate vests in the insolvency court, and the order for costs cannot be executed by the insolvent or on his death pending insolvency by his heirs as an agent or agents under section 59 (e) without the leave of the court on an application in that behalf. Mere leave to execute the order is not sufficient to entitle the heirs of the deceased insolvent to clothe them with title to execute the decree (4).

59. Subject to the provisions of this Act, the receiver shall, with all convenient speed, realize the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may—

(a) sell all or any part of the property of the insolvent ;

(b) give receipts for any money received by him;

(1) *Sita Ram v. Mst. Nathi Bai*, A. I. R. 1933 Nag. 365, F. B. See also commentary under section 54A and the cases cited there.

(2) *Sankara Narain Pillai v. Rajamani*, 47 Mad. 462 : 83 I. C. 196 : A. I. R. 1924 Mad. 550 ; also see A. I. R. 1927 Mad. page 1 in this connection.

(3) *Manak Chand v. Ibrahim*, 62 I. C. 307 : A. I. R. 1921 Nag. 25.

(4) *Chhatrapat Singh Dugar v. Kharag Singh*, A. I. R. 1936 Cal. 521,

and may, by leave of the Court, do all or any of the following things, namely :— **S. 59.**

- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;
- (d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;
- (e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court ;
- (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit ;
- (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts ;
- (h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ; and
- (i) divide in its existing form amongst the creditors, according to its estimated value any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold. *

History.—The present section reproduces section 20 of the Act III of 1907.

Analogous law.—S. 68, Presidency-towns Insolvency Act, is almost the same as the present section, except that in clauses (f) and (g), the following expression “or fully paid shares, debentures or debenture stock in any limited company” occur between the words ‘time’ and ‘subject,’ and that in clause (g), the words “are for the purpose of carrying on the business” occur in the end. The corresponding sections of the Bankruptcy Act of 1914, in which the powers of the trustee in bankruptcy are defined, are sections 55 and 56. In section 55, there are given powers of the trustee which he can exercise without obtaining the leave of anybody. In section 56, are given those powers which the trustee may exercise with the permission of the committee of inspection. Under the English Act, the trustee may exercise, besides the powers which a receiver under the Provincial Insolvency Act has, also some other powers described in clauses (3) to (5) of section 55. By section 56, it is also provided that the permission given for the purpose of that section shall not be a general permission, but shall

- S. 59.** only be a permission to do a particular thing or things for which permission is sought in the specified case or cases..

Scope.—The section deals with the duties and powers of the receiver. His duties are described in a general way by providing that the receiver shall realise the property of the debtor with all convenient speed and shall distribute dividends among the creditors. In order to effectually discharge the general duties of realisation and distribution imposed upon him by the Act, he is given the powers specified in clauses (a) to (z) of the section. The power of selling the property and giving receipts for any money received by him may be exercised by the receiver in his own right and in his discretion without reference to the court or without any serious interference by it. The powers specified in clauses (c) to (z) may be exercised by leave of the court. These are powers of a responsible nature and their exercise is liable to affect the estate in a material manner. The provision for obtaining the leave of the court is intended to make the control of the court over the receiver in the administration of the estate more effective and more watchful.

Clause (a) ; power to sell.—The sale of the insolvent's property by the receiver is a sale by the owner of the property and he may sell all or any part of the property of the insolvent in his discretion (1). As an owner he may sell the property by public auction or by private contract (2). The sanction of the court is not necessary and it is doubtful whether an insolvency court should order directing the sale of an insolvent's property, for the selling of the property lies within the discretion of the receiver under S. 20 (a), P. I. A., 1907 (3). Trustees are bound, like other vendors, to make good title, unless they expressly stipulate to sell with such title as they have got (4). If the trustees advertise for sale in the common way, it shall be presumed that they offered to give good title and that they should be bound as other persons (5). Their Lordships of the Privy Council have strongly deprecated sales by an official assignee of lands in possession of alienees from the insolvent as being part of the insolvent's estate, on the ground that such sales are in substance, if not in form, nothing more than the sales of the rights to litigate and that, assuming that they do not come with the prohibition in the Transfer of Property Act against a transfer of a mere right to sue, they are open to the same objection (6). To the reasons above stated it may be added that, in the absence of a covenant for title, the property sold is likely to fetch a very low price thereby injuring the interests of the creditors. In all cases where the title of the insolvent to the property is disputed, it is desirable that the question of title should be first decided by proper proceedings under the Act or by a regular suit before the property is sold.

Where share certificates have been pledged with the bankrupt, and the pledger had disappeared, the trustee, on applying for direction, was directed to advertise that the shares would be sold unless redeemed within

(1) *Woonwalla & Co. v. N. C. Macloed*, 1906, 30 Bom. 515.

(2) S. 55, B. A., 1914; *Entazuddi Sheikh v. Ram Krishna*, 16 I. C. 745; A. I. R. 1920 Cal. 935.

(3) *Arman Sardar v. Satkbira, Joint Stock Co., Ltd.*, 20 I. C. 273.

(4) *Donald v. Hanson*, 12 Ves 277; *White v. Foljambe*, 11 Ves 343.

(5) *M. Donald v. Hanson supra*.

(6) *Chokalingam Chetty v. Seethai Acha*, 107 I. C. 237; 6 Rang. 29; A. I. R. 1927 P. C. 252.

one month (1). Where the title of the insolvent to the property is not decided beforehand and the receiver purports to sell the right, title or interest of the insolvent, it is a question to be determined on the facts of each case as to what rights the receiver actually sold. Where the official receiver had power to sell not only the share of the adult insolvents but also had vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts, and where the recital in the deed was that the property belonging to all the members of the family was sold and there was no specific recital that the shares of the various persons were sold separately, it was held that the property purported to be sold and which actually vested in the official receiver would pass to the vendees and that that property included the shares of the sons (2). S. 59.

A sale by the receiver is not a sale by the court and the provisions of O. 21, C. P. C., do not apply, by virtue of S. 5, P. I. A., 1920, which makes the procedure given in the Civil Procedure Code applicable to insolvency proceedings (3).

Setting aside of the sale by the court.—Selling the property of the insolvent is an act of the receiver within the meaning of section 68 and an appeal lies to the court under that section. It can, in the exercise of its powers under section 68, set aside the sale, if a proper case is made out. Apart from that section, the district court has powers of supervision over the official receiver and can give him directions not to complete a contract of sale in exercise of such powers (4). The court will not interfere with the trustee's discretion at the instance of the creditor, unless it is shown that the trustee is acting as no reasonable man would (5). The court has no jurisdiction to set aside a sale held or made by the receiver in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part, causing injury to the estate. The sale may of course be set aside, if the receiver acts beyond his authority or in excess of the powers conferred on him (6). Fraudulent misrepresentation by one of the creditors is not a ground for

(1) *Re Harrison and Ingram*, 14 Mans 132

(2) *Shankar Narayana Pillai v. Raja Mani*, 83 I. C. 193: 47 Mad. 462: A. I. R. 1934 Mad. 550

(3) *Mulchand v. Murarilal*, 36 All. 8: 21 I. C. 702: A. I. R. 1914 All. 212 (it was held that order 21, rule 58 was not applicable to insolvency proceedings): *Chedatal v. Lachmanprasad*, 39 All. 267: A. I. R. 1917 All. 74: 37 I. C. 830, (order 21, rule 86 does not apply); *Entazuddi Sheikh v. Ramkrishna*, 60 I. C. 745: A. I. R. 1920 Cal. 935; *Maung Tha Dum v. Poka*, 107 I. C. 172: 5 Rang. 768: A. I. R. 1928 Rang. 60 (order 21, rule 89 does not apply); *Shakar Khan v. Sarmukh Singh*, A. I. R. 1932 Lah. 320: 136 I. C. 267 (sale was not set aside though it was held in the receiver's office and not on the spot); *Husaini v. Mohd. Zumir Abedi*, 74 I. C. 802: A. I. R. 1924 Oudh 204; *Avnashi Chetty v. Muthu Karuppan Chetty*, A. I. R. 1918 Mad. 136 (1): 44 I. C. 885 (order 21, rule 90, does not apply); *Ariff v. Fatima Begum*, 6 I. C. 300 (confirmation of the sale is not necessary.)

(4) *Avnashi Chetty v. Muthu Karuppan Chetty*, A. I. R. 1918 Mad. 136(1): 44 I. C. 885.

(5) *Exp. Lloyd*, 47 L. T. 64.

(6) *Maung Tha Dum v. Po Ka*, 107 I. C. 172: 5 Rang. 768: A. I. R. 1928 Rang. 60.

S. 59. setting aside a sale. The principle of caveat emptor applies in such cases (1). A sale cannot be set aside on the ground that it was held by the official receiver at his office and not on the spot (2). Under the Provincial Insolvency Act a receiver cannot sell the mortgaged property free from the mortgage, unless on the facts it is found that the action of the mortgagee was equivalent to an authorisation of the receiver to sell on the mortgagee's behalf (3). Opinion has been expressed that sale of property consisting of separate dwelling houses simultaneously, or a sale, before the equities of a *bona fide* purchaser have been settled, is prejudicial to the insolvent's estate (4).

To whom the property may be sold.—Some persons are incapacitated to purchase the bankrupt's estate or the claims of the creditors thereon. Under the old law, the assignee, a commissioner, a solicitor and an auctioneer employed to sell in the bankruptcy were all held incapable of purchasing; and such a sale, unless it seemed beneficial to the creditors, would be set aside, and the property be re-sold, and such improper purchaser would be charged with the loss, if any, on re-sale (5). A sale to the bankrupt's solicitor was held to be irregular and was set aside (6). In another English case, a sale to a brother and alleged partner of the trustee was set aside (7); but in a subsequent case, a sale to a partner of a member of the committee of inspection on his private account was held not to infringe the rule (8). To enable an assignee to bid, he must either have been first removed or have obtained the consent of the court; and such leave of the court might, under very peculiar circumstances, be obtained (9). A mortgagee, by leave of the court, may bid at the sale of the mortgaged property (10). The sale of the bankrupt's property may be to the bankrupt himself. In many cases a higher price may be obtained from him than a stranger would be willing to give (11).

Sale of goodwill by the receiver.—Exception 1 to section 7 of the Indian Contract Act, which provides that the buyer can restrain the seller from interfering with the goodwill by soliciting former customers, does not apply to the sale of the goodwill of the insolvent's business by the official assignee. The reason is that a sale by the official assignee or a receiver is, so far as the insolvent is concerned, a compulsory sale (12). The same principle applies where the business is bought from a trustee under a deed of arrangement (13). The principle of these decisions has,

(1) *Ammasi Goundan v. Subramania Chettiar*, 97 L. C. 781: A. I. R. 1926 Mad. 1080.

(2) *Shakar Khan v. Sarmukh Singh*, A. I. R. 1932 Lah. 320.

(3) *P. C. Dass v. U. Tun Aung*, A. I. R. 1934 Rang. 637: 136 L. C. 267 (it was found as a fact that there was an authorization by the mortgagee and that the sale was made free from the mortgage.)

(4) *Virrana v. Venkataramaya*, 98 L. C. 1065: A. I. R. 1927 Mad. 232.

(5) *Exp. Lewis*, Gl. & J. 69.

(6) *Luddy's Trustee v. Peard*, 33 Ch. D. 500.

(7) *Exp. Moore*, 51 L. J. Ch. 72.

(8) *Re Gallard*, 1897, 2 Q. B. 8.

(9) *Pooley v. Quilter*, 2 DeG & J. 327; *Exp. Bennett*, 10 Ves. 381; *Exp. Farley*, 3 Dea. & C. 110; *Exp. Towne*, 1834, 4 D. & C. 519.

(10) S. 132 of the Act of 1861; *Exp. Say*, 1 D. & C. 32.

(11) *Kitson v. Hardwick*, L. R. 7 C. P. 473.

(12) *Walker v. Mottram*, 1881, 19 Ch. D. 355.

(13) *Green & Sons, Northampton Ltd., v. Morris*, (1914) 1 Ch. D. 562.

however, not been extended to the case of a sale by an executor (1). It is the court which can set aside a sale by the receiver. The official receiver himself has no power to set aside a sale held by him (2). **S. 59.**

Clause 2 ; power to give receipts.—Receipts given by the receiver for moneys received effectually discharge the person paying the money from all liabilities.

Leave of the court.—Powers mentioned in clauses (c) to (i) are to be exercised by the receiver with the leave of the court. The leave is, however, obtained by the receiver for his own protection and is not a condition precedent to the exercise of any of these powers. Nor want of leave is a defence to a suit by the receiver. Want of leave does not make the act done a nullity, though it may be liable to be set aside in appeal under section 68 on that ground. It is an administrative provision only (3). These cases have been followed in India and the same view has been adopted by the Indian Courts (4).

Clause (c) ; carrying on the business of the insolvent. The clause permits the carrying on of the insolvent's business by the receiver so far as it is necessary for the beneficial winding up of the same. As to when it is beneficial for the estate depends upon the facts of each case. The general rule is that a creditor cannot insist on its immediate sale unless he proves some damage which he has sustained (5) ; and conversely, the court would not interfere to prevent the assignee from selling unless there be proof that the sale would do irreparable injury to the bankrupt's estate (6). The business should not be carried on for any other purpose, that is to say, in the hope of making profit even though the majority of creditors authorise him to do so (7). A trustee carrying on the bankrupt's business must keep a distinct account of the trading. A hereditary priest, who received pilgrims coming to the temple of Jagannath, housed and fed them and looked after their comfort and accompanied them to the temple, and for these services received from them payments in the nature of voluntary contributions, has been held not to carry on a business within the meaning

(1) *Boorne v. Wicker*, 1927, 1 Ch. 667.

(2) *Ammasi Goundan v. Subrammia Chettiar*, 97 I. C. 781 : A. I. R. 1926 Mad. 1080.

(3) *Lee v. Sangster*, 1857, 5 W. R. 487 ; *Leeming v. Lady Murray*, 1879, 13 Ch. D. 123 ; *In re Branson, Exp. Trustee*, 1914, 2 K. B. 701 ; *Cycle Maker's Co-operative Supply Co., v. Sinns*, 1903, 1 K. B. 477, case of a liquidator of a company.

(4) *Lalchand v. Tejibhan*, 112 I. C. 452 : A. I. R. 1929 S. 41, case of a compromise effected by the official receiver without the sanction of the court ; *Official Receiver Coimbatore v. Kanga*, 69 I. C. 908 : 45 Mad. 167 : A. I. R. 1922 Mad. 51 ; *Mahomed Ghalit v. Abdul Rahim*, 89 I. C. 419 : A. I. R. 1926 Nag. 156 ; *Laduram v. Nandlal*, 1920, 47 Cal. 555 : 55 I. C. 747 ; *Rupram v. Fazaldin*, 1 Lah. 237 : A. I. R. 1920 Lah. 43 (it is a case under the Companies Act. Certain proceedings taken by the liquidator without the leave of the court were held to be binding and to be operative as *res judicata* against the liquidator in subsequent proceedings). The dicta in *Grey v. Lamond Walker*, 1913, 17 C. W. N. 578 : 18 I. C. 756 and *Thiravenkatachariar v. Thangia Ammal*, 1916, 39 Mad. 479 : 23 I. C. 291 to the contrary are, it is submitted, not good law.

(5) *Exp. Hall*, 2 Dea. 263 ; *Exp. Kendall*, 17 Ves 514.

(6) *Exp. Montgomery*, 1 Cl. & J. 338 ; *Re Walsh*, 9 Ir. Ch. 16 ; *Re Atkinson*, 1 M. D. & D. 238.

(6) *Exp. Emmanuel*, 17 Ch. D. 35.

- S. 59.** of the clause (1). An official receiver in continuing to take on lease the premises in which the printing press of the insolvent is worked acts under sections 59 (c) and must enter into the arrangement with the leave of the court (2).

Clause (d); suit and legal proceedings by and against the receiver.—The clause authorises the receiver to carry on legal proceedings which were started by the insolvent before his insolvency, or defend those which were started against him before his insolvency, or institute new suits or initiate new legal proceedings after the insolvency. The receiver is the owner of the insolvency estate and the insolvent himself ceases to have any interest in the property. In respect of those causes of action which survive on insolvency and vest in the receiver the insolvent has no right to be in charge of or conduct proceedings (3). In an Allahabad ruling it has been held that a suit by the insolvent for a declaration that a decree obtained by the defendant is vitiated by fraud and should be set aside is maintainable even after the insolvency on the ground that the decree is the property of the decree-holder defendant and not of the insolvent-plaintiff (4). The judgment might also be supported on the ground that the decree is only a money claim in which the receiver is not interested till the person claiming under it seeks to prove it in insolvency. The power conferred on the receiver is confined to cases, where the suit relates to the property of the insolvent which has vested in him. A suit against an insolvent for debt or for damages for a breach of contract is not a suit of such a nature. The plaintiff is not entitled to join the official assignee as party to the suit; and for the same reason the receiver is not entitled to defend the suit (5). The rule does not cause any prejudice to the estate of the insolvent because the decree does not bind it as such and the insolvency court has jurisdiction to inquire into the real nature of the debt at the time of proof.

Procedure.—The procedure where the plaintiff or the defendant becomes insolvent is laid down in O. 22, rr. 8 and 10. The same rules apply to the case of appeals. O. 22, r. 8, runs as follows:—

“(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not

(1) *Anand Mahanti v. Ganesh Maheshwar*, 21 I. C. 969 : 40 Cal. 678.

(2) *Ram Shankar v. Secretary of State*, 139 I. C. 701 : 54 All. 879 : A. I. R. 1932 All. 575.

(3) *Sadodin v. W. Spiers*, 3 Bom. 437 ; *Surrendra Nath v. Tripura Pada*, A. I. R. 1928 Cal. 215 : 109 I. C. 282 (the proceedings were on appeal filed by the insolvent from an order refusing to set aside an *ex parte* decree on an application put in before his insolvency); *Kissen (Ispal v. Suklal)*, A. I. R. 1927 Cal. 76 : 53 Cal. 844 : 98 I. C. 981 ; *Tribhovandas v. Abdul Ally*, 1914, 39 Bom. 568 : A. I. R. 1915 Bom. 298 : 28 I. C. 506 ; *Asanand v. Jugal Kishore*, A. I. R. 1933 Lah. 1008 : 141 I. C. 778 (it was held that an insolvent has no right to protest against the sale by receiver of mortgaged property free from the mortgage); *Subbayar & Bros. v. Muniswami & Sons*, 98 I. C. 516 : 50 Mad. 151 : A. I. R. 1926 Mad. 1133 ; *Khelafut Hossain v. Ajmal Hossain*, 54 I. C. 699 : A. I. R. 1920 Pat. 277 (suit to recover deferred dower of daughter by the insolvent father).

(4) *Ram Narain v. Behari*, 27 I. C. 876 : A. I. R. 1914 All. 542.

(5) *Barter v. Dubeux & Co.*, 1881, 7 Q. B. D. 413 ; *Miller v. Budh Singh*, (1891) 18 Cal. 43 ; *Chandmull v. Ramee Sundery*, 1895, 22 Cal. 259 ; *Subbayar v. Munuswami Ayyar*, 1927, 50 Mad. 161 : 98 I. C. 516 : A. I. R. 1926 Mad. 1133.

cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct. S. 59.

(?) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."

Under the above rule it has been held that where, pending the hearing of the case, the plaintiff is adjudicated insolvent and consequently he is not present at the hearing and the court is informed that the plaintiff has become insolvent, the court should call upon the official assignee to state whether he intends to continue the suit; and if the official assignee decides that he would continue the suit, it would then be necessary for the court to make an order that he should give security for the costs of the suit within a specified time (1). Similarly if the appellant becomes insolvent pending the appeal, the same procedure will apply, *vide* O. 22, r. 11, C. P. C. If, however, the adjudication is annulled, after the suit has been dismissed under Order 22, rule 8, owing to the neglect or refusal of the assignee or receiver to give security or to continue the suit, and the property has reverted to the plaintiff, the court may on the plaintiff's application restore the suit (2). If the adjudication is annulled pending the suit and the property has reverted to the plaintiff, he is entitled to continue the suit (3).

Security for costs.—Under the rule it appears that on the insolvency of the plaintiff the court shall ordinarily call upon the official assignee to furnish security for costs. In England, however, it has been held that a trustee in bankruptcy, who brings an action for the benefit of the estate, will not be required to give security for costs, even though he is in insolvent circumstances (4), and that bankruptcy is not, as such, a ground for ordering the plaintiff to give security for costs (5). If a trustee elects to go on with a pending action, he must adopt the whole of it. Thus where a trustee adopted a defence, he was ordered to pay the costs of an interlocutory appeal presented by the bankrupt (6).

Insolvency of defendant.—Order 22, rule 10 (1), runs as follows :—

"In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the

(1) *Kissen Gopal v. Suklal*, A. I. R. 1927 Cal. 26 : 53 Cal. 844 : 98 I. C. 781.

(2) *Kissen Gopal v. Suklal* *supra*.

(3) *Haji Sajan v. Macleod*, 1903, 32 Bom. 331, 334.

(4) *Denston v. Ashton*, L. R. 4 Q. B. 590; *Cowell v. Taylor*, 31 Ch. D. 34.

(5) *Rhodes v. Dawson*, 16 Q. B. D. 548; *Cook v. Wellock*, 24 Q. B. D. 658.

(6) *Abdul Rahman v. Shaw Wallace & Co.*, 92 I. C. 620 : A. I. R. 1925 Mad. 736.

- S. 59. Court, be continued by or against the person to or upon whom such interest has come or devolved.⁵

The rule has been held to apply to the revocation of interest by reason of an order of adjudication (1).

Here again, just as where the insolvent was a plaintiff in an action, if the trustee elects to defend the suit he must abate the whole of it. By electing to defend the suit he puts himself in the place of the insolvent as regards the suit, and he cannot adopt part of the suit and reject the rest (2).

Receiver's liability for costs.—The receiver can be made personally liable for the payment of costs incurred by the other side in the suit or proceedings. It is in the discretion of the court, which decides the case, to direct the receiver to pay the costs personally. If the action is by the insolvent and the official assignee continues the action, knowing that the action is wholly unsustainable, and if, in the conduct of the action, he is guilty of any misconduct, which a prudent man would not be a party to, then it would be open to the court to direct the official assignee to pay the costs of the suit personally. But where there is a *bona fide* dispute and where the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the official assignee, if he acts *bona fide*, shall not be made to pay costs personally, *i. e.*, out of his pocket; but he is entitled to have an order made to pay his costs out of the estate (3). The receiver is an ordinary litigant and like any other litigant he can be ordered to pay costs of any action taken or defended by him (4). Ordinarily the order for costs should not be directed to be limited to the assets in the hands of the receiver. If the assets in his hands are insufficient to pay all the costs, he must bear them personally. In such a case he should have protected himself by obtaining an indemnity from the parties in whose interest the motion was brought before he started proceedings (5). The same rules apply where the receiver unsuccessfully resists an action or application (6). A simple order for costs against the

(1) *Punithalu v. Bhashyam*, 1902, 25 Mad. 406, 413; *Subbayya Bros. v. Munnuswami Aiyar*, 1927, 53 Mad. 161 : 98 I. C. 516 : A. I. R. 1926 Mad. 1133; *Kalachand v. Jagannath*, 54 I. A. 190 : 54 Cal. 595 : 101 I. C. 442 : A. I. R. 1927 P. C. 108.

(2) *Borneman v. Wilson*, 1885, 28 Ch. D. 53.

(3) *Abdul Rahman v. Shaw Wallace & Co.*, A. I. R. 1925 Mad. 736 : 92 I. C. 620.

(4) *John Tweedle & Co., Ltd. in re*, 1910, 2 K. B. 697; *Williams & Co., in re*, 1913, 2 K. B. 88 : 103 I. T. 585; *James Bevis & Turner*, 1883, 7 Bom. 484; *Ex parte Augerstein*, (1874) L. R. 9 Ch. App. 479 (application); *Pitts v. La Fontaine*, (1880) 6 App. Cas. 482 (plaintiff); *Balakrishna Menon v. Manakkal Kina*, (1929) 52 Mad. 263 : 114 I. C. 825 : A. I. R. 1929 Mad. 105 (plaintiff); *Watson v. Holliday*, (1882) 20 Ch. D. 780; *Re Mackenzie*, (1899) 2 Q. B. 566; *Re Bryant*, (1889) 6 Morr. 262.

(5) *Exp. Augerstein*, 1874, L. R. 9 Ch. App. 479; *Re Suresh Chander Goyce*, 1918, 23 C. W. N. 431 : A. I. R. 1919 Cal. 337 : 51 I. C. 654; *Re Wilkinson*, 1884, 1 Mor. 65; *Re Glanville*, 1855, 2 Mor. 71; *Re Arthur Williams & Co.*, 1913, 2 K. B. 88; *Re Mackenzie* 1899, 2 Q. B. 556; *Re Bryant*, 1889, 6 Mor. 262.

(6) *Re John Tweedle & Co., Ltd.*, 1910, 2 K. B. 697; *Re Galey*, 1890, 7 Mor. 253; *Re Bryant*, 1889, 6 Mor. 262; *Re Abdul Rahiman Sahib and Co.*, 1928, 51 Mad. 308 : 112 I. C. 483 : A. I. R. 1928 Mad. 890; *Official Assignee of Calcutta v. Ramratan Das Bagree*, 1927, 54 Cal. 317 : 102 I. C. 539 : A. I. R. 1927 Cal. 529.

official receiver has the usual meaning of such an order against any litigant, § 59. and the official receiver is, therefore, in the first instance personally liable for costs. And that liability does not cease even after he ceases to be the official receiver (1). This is, however, true where the order for costs is passed in an action. Where the order for costs is passed in bankruptcy, rule 96, B. A., provides that a simple order for costs will not imply that the official receiver must pay them personally. The practice in the Madras and Calcutta High Courts, even on the insolvency side, appears to be to hold the official assignee in the first instance personally liable for costs (2). The distinction between an order for costs in an ordinary action and one made in insolvency proceedings was also recognised by the Allahabad High Court in a case where it was held that, in the absence of anything to show that the costs should be recovered from the assets of the insolvent, the receiver was personally liable for the costs (3). Where, however, the official assignee is discharging a statutory duty imposed upon him by the Act, there is no power to order him to pay his costs (4). It does not, however, mean that the receiver is left without a remedy. Where he has obtained the leave of the court, he is entitled to claim re-imbursement out of the estate (5). The official receiver should, where the estate is small, before embarking on litigation as plaintiff or defendant or making an application, obtain from the creditors for his own protection an indemnity against costs (6). Such an application can be made even after the suit (7).

The official receiver will be made liable for the whole of the costs of the suit only if he is a real contesting party (8). If he is simply made a party for the convenience of the other parties and submits himself to the order of the court, he will, in general, not have to pay any costs to any opposite party (9).

The receiver may also take an indemnity for his costs from a person, in whose interests the motion is made (10). Not only that but also it is the duty of the official receiver to launch a motion in ordinary course where indemnity for costs is given. When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the official receiver's duty to give notice to such a creditor and ask him to substantiate his allegation. The official receiver should represent the estate for the benefit of creditors and place before the court the result of his inquiry and help a creditor, on his giving an indemnity for costs, even to appeal against the order of the court (11).

(1) *Balakrishna Menon v. Manikkal Uma*, A. I. R. 1929 Mad. 105 : 52 Mad. 263 : 114 I. C. 825.

(2) *In re Suresheandar Gooyee*, A. I. R. 1919 Cal. 337 : 51 I. C. 654 ; *In re Abdul Rahiman Sahib*, A. I. R. 1925 Mad. 736 : 92 I. C. 620.

(3) *Lachhmandas v. Lakshmi Narain*, 54 All. 444 : 137 I. C. 70 : A. I. R. 1932 All. 288.

(4) *Balakrishna Menon v. Manikkal Uma supra*.

(5) *Re John Tweedle & Co., Ltd.*, (1910) 2 K. B. 697.

(6) *Ex parte Augestein*, 1874 L. R. 9 Ch. App. 479.

(7) *Lachhman Das v. Lakshmi Narain*, A. I. R. 1932 All. 288 *supra*.

(8) *Watson v. Holliday*, (1882) 20 Ch. D. 780; *Borneman v. Wilson*, (1885) 28 Ch. D. 23 ; *School Board for London v. Wall Bros*, (1891) 8 Mor. 202.

(9) *See Dansk Rekyllriffel Aktiesselskab Syndikat v. Snell*, (1908) 2 Ch. 127, p. 128.

(10) *Re Suresh Chandar Gooyee*, 51 I. C. 654 : A. I. R. 1919 Cal. 337 ; *Balakrishna Menon v. Manikkal Uma*, A. I. R. 1929 Mad. 105 : 52 Mad. 263 : 114 I. C. 825.

(11) *Anatha Narayan Aiyar v. Rama Subba Aiyar*, 79 I. C. 395 : 47 Mad. 673 : A. I. R. 1924 Mad. 345.

- S. 59.** Where an appeal is preferred by the insolvent against an order of adjudication the court may, besides awarding costs to the respondents (petitioning creditors), award to the official assignee or the receiver the costs which he has incurred in appearing in the appeal and in supporting the creditors (1). Where a person who was adjudicated insolvent by the High Court of Calcutta applied to set aside the order of adjudication and the application was allowed with costs, it was held that a suit would lie to recover such costs (2). Where the adjudication is annulled owing to a composition made by the debtor with the creditors, the costs of the official receiver should be recovered out of the estate of the insolvent (3). Costs ordered to be paid by a petitioning creditor to a debtor, when an adjudication in bankruptcy is set aside, cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor (4).

No leave necessary to sue the receiver.—No leave is necessary to sue the receiver in respect of a claim made by a third person to a property claimed by him as belonging to the estate of the insolvent (5). A receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in the bankruptcy. The whole of the property of the insolvent vests in him and he remains the owner thereof until he is discharged; and in this respect there is a difference between the appointment of such a receiver and one appointed in an action (6). In a Lahore ruling it has been held that no suit is maintainable against the receiver of an insolvent's estate, except with leave of the court that had appointed the receiver, but such leave is not a condition precedent to the institution of the suit against him (7). The Lahore ruling, it is submitted with respect, is erroneous. The same High Court has also held that where a receiver appointed under the Provincial Insolvency has already sold the property in dispute to another, previous to the date of the suit by plaintiff, the receiver is not a necessary party to the suit and the suit can proceed without the permission of the insolvency court, notwithstanding that the receiver is mentioned as one of the defendants (8). This ruling too does not appear to be good law so far as it assumes that leave of the insolvency court is necessary.

Notice under S. 80, C. P. C., 1908.—It is provided by S. 80, C. P. C., that before an officer can be sued in respect of any act purporting to be done by such public officer in his official capacity, a notice, as prescribed therein, shall be given to him. It has been held that the official assignee or the receiver is a public officer within the meaning of S. 80, C. P. C., and that, other things being equal, he is entitled to a notice

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- (1) In the matter of Haroon Mahomed, (1890) 14 Bom. 189.
 - (2) Annoda Prasad Banerji v. Nobo Kishore Roy, (1906) 33 Cal. 560.
 - (3) Arjandas v. Fazal, 110 I. C. 305 : A. I. R. 1929 Lah. 89.
 - (4) *In re* Ebrahim Ahmed, 55 Bom. 377 : 128 I. C. 21 : A. I. R. 1930 Bom. 516.
 - (5) Amritlal v. Narain Chandra, A. I. R. 1919 Cal. 781 : 53 I. C. 973 ; Sant Prasad Singh v. Sheodat Singh, (1923) 2 Pat. 724 : 77 I. C. 589 : A. I. R. 1924 Pat. 259 ; Maharana Kuwar v. David, (1924) 46 All. 16 : 77 I. C. 57 : A. I. R. 1924 All. 40 ; Ramalinga Chetty v. Anatacharya, (1913) 18 I. C. 722.
 - (6) Amritlal Ghosh v. Narain Chandra Chakravarti *supra*.
 - (7) Mahommed Umar v. Munshi Ram, 41 I. C. 802 : A. I. R. 1917 Lah. 351.
 - (8) Kundan Lal v. Shadi Ram, 41 I. C. 809 : A. I. R. 1917 Lah. 360.

under that section (1). No notice is necessary if the suit is not in respect of any act purporting to be done by the assignee or receiver in his official capacity. Thus it has been held that no notice is necessary where the suit is by a secured creditor and the receiver is impleaded as a defendant, as a person in whom the equity of redemption is vested (2). S. 59.

Notice under Order 21, rule 22, C. P. C., 1908 and Order 21, rule 6.—The official assignee is a legal representative of the insolvent in respect of the insolvent's property vested in him within the meaning of Order 21, rule 22, C. P. C. A sale, therefore, of the insolvent's property in execution of a money decree against him without notice to the official assignee as required by Order 21, rule 22, is void and confers no title on the auction-purchaser (3). Where, in execution of a decree against father, the son's share was sought to be sold after the insolvency of the father and the receiver was ordered by the court to be made a party to the execution proceedings, it was held that he was entitled to notice under Order 21, rule 66, C. P. C. (4).

Receiver's right to sue in forma pauperis.—Under Order 23, rules 1 and 3, there appears to be a conflict of opinion as to whether the receiver of an insolvent's estate, which is unable to pay court-fee, can sue in *forma pauperis* on behalf of the estate. It has been held by the Rangoon High Court, relying on a Bombay Ruling (5), that the word 'person' in Order 33 means a natural person, *i. e.* a human being and does not include a juridical person such as a receiver, and that, therefore, a receiver cannot be allowed to sue as a pauper, where the receiver himself is possessed of sufficient funds to carry on the suit, though the estate of which he is the receiver may not be sufficient for that purpose (6). The contrary appears to have been held in the undermentioned cases (7).

Receiver's moral duty in conducting suits.—In deciding what is the duty of the official receiver with regard to a contested action, in which he is concerned as a trustee, the court must consider not merely whether he has a cause of action or right or defence or an answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case (8). Following this principle it has been held by the Rangoon High Court

(1) Joosub Haji Ali v. Kemp, (1905) 26 Bom. 800; DeSilva v. Govind, A. I. R. 1920 Bom. 70; 44 Bom. 895; 58 I. C. 411; Maharana Kunwar v. David, 46 All. 16; 77 I. C. 57; A. I. R. 1924 All. 40; Murari Lal v. David, 47 All. 291; 84 I. C. 739; A. I. R. 1925 All. 241 (2).

(2) Skipper & Co., Ltd. v. David, (1926) 48 All. 821; 99 I. C. 138; A. I. R. 1927 All. 132; Kashi Bai v. Channi Lal, A. I. R. 1930 Bom. 11; 122 I. C. 857.

(3) Raghunath v. Sundardas, A. I. R. 1914 P. C. 129; 42 Cal. 72; 24 I. C. 304.

(4) Rama Shesha Iyar v. Ramanuja Achariar, A. I. R. 1935 Mad. 459.

(5) Manaji Rajaji v. Khandoo Baloo, (1912) 36 Bom. 279; 11 I. C. 724.

(6) S. M. Mitra v. Corporation of the Royal Exchange of Assurance, A. I. R. 1930 Rang. 259; 126 I. C. 650.

(7) Mohamed Zaki v. Municipal Board of Mainpur, A. I. R. 1918 All. 177 (1) 47 I. C. 557; Sivagami Ammal v. Gopalaswami Odayar, A. I. R. 1925 Mad. 765; 87 I. C. 372; S. M. Mabia Khatun v. Sheikh Satkari, 100 I. C. 264; A. I. R. 1927 Cal. 309; Perumal Koundan v. Tirumalrayapuram, Dhana sekhar, 41 Mad. 624; 45 I. C. 161; A. I. R. 1918 Mad. 362.

(8) *In re Thellusson*, 1919, 2 K. B. 735.

- S. 59. that where a certain company alone, and not the insolvent, possessed a moral or equitable claim to a certain sum, which represented money that had been entrusted by the company to the insolvent to be applied by him for a specific purpose as their agent, and the insolvent had no beneficial interest in the sum except to the extent of his commission, the official assignee was justified in refusing to intervene (1).

The official receiver as an official of the court is bound to bring to the notice of the district court, before which an appeal against his order refusing to confirm the sale of an insolvent's property may be pending, the facts that are likely to affect its decision. He should also represent the insolvent's estate in the appeal (2).

Clause (e) ; employment of pleader or agent The sub-clause authorises the receiver, with the leave of the court, to employ a pleader or an agent for the purpose of taking any legal proceedings or for doing any business sanctioned by the court. The pleader or solicitor employed should be independent of and having no connection with the committee of inspection. Thus where one of the members of the committee of inspection was managing clerk to a firm of solicitors, the appointment of the firm as solicitors to the trustee was held improper and set aside (3). The committee of inspection or, where there is none, the Board of Trade, in England, may limit the amount of costs which may be incurred (4). A solicitor of a trustee is entitled to a lien on the documents in the trustee's possession for work done by him as a solicitor to such trustee (5).

Clause (f) ; sale on credit.—Under clause (a), the receiver himself may sell all or any part of the property of the insolvent for cash money on his authority. Under clause (f), he can make the sale on credit with the permission of the court and subject to the conditions imposed by the court as to security or otherwise. The purchaser of property belonging to an insolvent cannot, however, impugn the sale on the ground that the receiver who sold the property entered into an arrangement with him for deferred payment of the purchase money without the leave of the court (6).

Under the Presidency-towns Insolvency Act, the receiver may accept, as consideration for any sale, fully paid up shares, debentures or debenture stocks in any limited company, besides money.

Sub-clause (g).—Under the clause the receiver can mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts, with the permission of the court. In a Lahore case, a mortgage by a person, who was not in fact the receiver appointed by a proper order, effected with the written permission of the court, was upheld. The facts were :—

R was ordered by an insolvency court to find ways and means to pay off the debts of the creditors. R reported to the court that the creditors could only be paid off if permission was given to him to mortgage one-half of the property belonging to the deceased insolvent.

(1) *Choung Taik v. Mathein Mu*, 8 Rang. 665 : 131 I. C. 504 : A. I. R. 1931 Rang. 74 (2).

(2) *Panja Ram Chandra Rao v. Gurraju*, 76 I. C. 977 : A. I. R. 1924 Mad. 147.

(3) *Re Gallard*, 1896, 1 Q. B. 68.

(4) *Re Duncan*, 1892, 1 Q. B. 879.

(5) *Exp. Yalden, re Austin*, 4 Ch. D. 129.

(6) *Shw Wa v. Sullivan*, 15 I. C. 368.

The court granted the permission by means of a written order and authorised R to effect a mortgage of one half of the property belonging to the insolvent. In a suit brought by the mortgagee on this mortgage, the mortgage was challenged on the ground that R's action in mortgaging the property was invalid. It was held that—

(i) that as soon as the order of adjudication was passed the estate of the insolvent vested in the court and R was merely acting as an agent of the court in effecting the mortgage in dispute;

(ii) that strangers to the insolvency proceedings were justified in believing that the court had done that which, by directions of the Act, it ought to have done; and

(iii) that the mortgage effected by R in favour of the mortgagee should not be treated as nullity (1).

Clause (h); arbitration and compromise.—Under the former English Acts it was held that the assignees were not bound by a submission of the bankrupt if the bankruptcy happened before award (2). Bankruptcy itself, however, does not revoke a submission to arbitration (3). It would seem that where the submission forms one of the terms of the contract the receiver cannot take advantage of the contract and at the same time repudiate the arbitration clause (4).

The sub-clause does not control or affect the right of the trustee to compromise actions which he had instituted in his official capacity (5). Having regard to the power to compromise conferred by this clause, the court will not generally give directions as to the acceptance of the compromise or otherwise; but it will be for the party objecting to the compromise to satisfy the court that it ought not to be entertained (6). If a majority of creditors are opposed to a compromise, the court will, as a general rule, refuse leave to compromise (7). The court may, however, in special cases, give directions or expressly authorise a compromise. In one case the court authorised a compromise by which the trustee in bankruptcy received fully paid up shares in a limited company (8). In another case an arrangement between the trustee under an English bankruptcy and the assignee under an Indian insolvency of the same partners was sanctioned by the court (9).

An arrangement between the trustee and a creditor for the carrying on of an action by the latter on terms was upheld in an English case (10). The arrangement was that the creditors were to carry on an action filed by the bankrupt before his adjudication at their own risk and expense, and to take a larger share of the fruits of the action than they otherwise would have done. It was held that such an arrangement did not con-

(1) *Shahabuddin v. Mst. Amri*, A. I. R. 1934 Lah. 837; 152 I. C. 638.

(2) *Dod v. Herring*, 3 Sim 143; *Marsh v. Wood*, 9 B. & C. 659.

(3) *Hemsworth v. Brian*, 1 C. B. 131.

(4) *Marsh v. Wood*, 1829, 9 B. & C. 659; 109 E. R. 245; *Hemsworth v. Brian*, 1845, 1 C. B. 131; *Pennell v. Walker*, 1854, 18 C. B. 651; 26 L. J. C. P. 291.

(5) *Leeming v. Lady Murray*, 13 Ch. D. 123.

(6) *Re Pilling*, 1906, 2 K. B. 644.

(7) *Re Ridgway*, 1889, 6 Morr. 277.

(8) *Re Macfadyen*, 98 L. T. 55.

(9) *Re Macfadyen & Co.*, 1908, 1 K. B. 675.

(10) *Guy v. Churchill*, 1889, 40 Ch. D. 481.

S. 59A. contravene the law against champerty and maintenance, and that such an agreement is permitted by the bankruptcy laws. In a Madras case a somewhat similar question arose. An official assignee intimated to the court his willingness to continue a suit instituted by the insolvent and was directed to furnish security for costs. Being unable to raise the money in the usual way he placed before the court a scheme for its approval where certain creditors, who had agreed to advance the money on condition that their debts be paid prior to those of other creditors in case any amount be recovered by the suit, were to be given such priority over the others. The scheme was not sanctioned on the ground that the official assignee, in the administration of the insolvent estate, can on no account prefer one creditor to another; and that it was opposed to the bankruptcy law which is to treat all creditors alike and the official assignee cannot contravene this rule, much less that the court should aid him to do so. It was also held that the agreement under the scheme being inconsistent with the policy of the Insolvency Act would be unlawful under S. 23, Contract Act (1). This case is adversely criticised in Mulla's Law of Insolvency on page 485. It is submitted that there can be no hard and fast rule in regard to the validity of an arrangement which should or should not be sanctioned by the court. In every case the benefit to the insolvent's estate and thereby to the general body of creditors should be considered, and a compromise may be sanctioned, even if, as a part of the arrangement, some of the creditors may have to be paid more than they would have otherwise got.

Clause (i).—The clause provides for those rare cases where the property of the insolvent is of a peculiar nature or, for any other special circumstances, it cannot readily or advantageously be sold. There is no reported decision on this clause under the English or the Indian Acts.

59A. (1) The Court, if specially empowered in this behalf by an order of the Local Government, or any officer of the Court so empowered by a like order, may, on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any documents in his custody or power relating to the insolvent or to his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the

(1) In the matter of *a. Parshotamlas & Bros.*, A. I. R. 133 Md. 835; 116 I. C. 125.

Court or such officer at the time appointed, or refuses **S. 59A.** to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any person so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.

History.—The section was added by section 4 of the Act 39 of 1926. It gives effect to the recommendation of the Civil Justice Committee made in 1920. They reported in the following terms :—

“It has been pressed upon us that the private examination section, *viz.* S. 38 of Presidency-towns Insolvency Act, should be made applicable to the mofussil, not that there is not already ample power under the Provincial Act to examine the debtor, but in order that a receiver may be able to examine a third party and thus to obtain, in a comparatively inexpensive manner, reliable information as to the debtor's conduct and affairs. The ordinary course in England and in Presidency-towns is for the receiver to obtain, under the section, evidence as to the dealings between the insolvent and a third party. He would, as a rule, be careful to utilise his powers under the section before launching a motion to set aside a fraudulent preference or to recover property. In the like manner, he would use the section, if necessary, to enable him to deal with doubtful proofs of debt. In the absence of such powers it is only to be expected that the setting aside of past transactions, under special principles of insolvency law, will be regarded, whether by a creditor or by a receiver, as a hazardous expenditure of time and moneyThe power of examining the third person, however, is very valuable. It is discretionary on the part of the court to grant the application for examination and it is discretionary in the court to allow, or to disallow, any particular questions. We suggest that, when the insolvency law is next amended, powers analogous to those of section 36 of the Presidency-towns Insolvency Act might be given, subject to the option of the Local Government to bring them into force for particular courts (1).”

The addition of the above section has been made in pursuance of the above recommendation (2). The legislature has, however, in enacting the present section not gone as far as the Civil Justice Committee wanted it to do. The section simply reproduces the first three sub-sections of S. 36, P.-t. I. A., and not the remaining sub sections. We shall examine the whole question under the next heading.

Analogous Law.—S. 25, B. A. of 1914, runs as follows :—

“(1) The court may, on the application of the official receiver or trustee, at any time after the receiving order has been made against a

(1) Civil Justice Committee report, page 232, para. 15.

(2) Statement of Objects and Reasons, Gazette of India, part 5, pp. 136-137, dated 21st August, 1926. See also *Quasim Ali v. Emp.* 43 All. 406 : 64 I. C. 37 : A. I. R. 1921 All. 87 ; *Joy Chandra Das v. Mohamed Amir*, 44 I. C. 143 : A. L. R. 1918 Cal. 147.

S. 54A. debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any document in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination.

(3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings, or property.

(4) If any person on examination before the court admits that he is indebted to the debtor, the court may, on the application of the official receiver or trustee, order him to pay to the receiver or trustee, at such time and in such manner as to the court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination.

(5) If any person on examination before the court admits that he has in his possession any property belonging to the debtor, the court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property or any part thereof, at such time, and in such manner, and on such terms, as to the court may seem just

(6) The court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section should be examined in Scotland or Ireland, or in any other place out of England."

The section above quoted was substituted for section 27 of the Act of 1883, which in its main terms was based on sections 96, 97, 98 and 75 of the Act of 1869. The Indian Acts are based on the Act of 1883. S. 105, B. A. of 1914, which corresponds to section 72 of the Act of 1869, defines the general powers of the bankruptcy court, just as S. 4, P. I. A., 1920, and S. 7, P-t. I. A., 1909, define the same in the Indian Acts. In England section 105 is to be read subject to the other provisions of that Act and it was held there that the insolvency court had no jurisdiction to order a debtor of the insolvent to pay the debt to the receiver or to order any person in possession of any property belonging to the insolvent to deliver possession thereof to the receiver, unless such person admitted his liability under section 25 of the Act. And in England the insolvency court has consistently refused to exercise jurisdiction in matters not arising out of the bankruptcy. Section 7, Presidency-towns Insolvency Act, is almost identical with the corresponding section 102 (1) of the Act of 1883, which has now been substituted by section 105, B. A., 1914. S. 36, P-t. I. A., was also amended in 1927. Before the amendment the court had the power, under sub-sections (4) and (5) of that section, if it was satisfied on the examination of any such person that he was indebted to the insolvent, to order him to pay to the official assignee the amount due to the insolvent, and, if it was satisfied on the examination of any such person that he had in his possession any property belonging to the insolvent, to

order him to deliver the property to the official assignee. The question arose in several cases as to the precise power of the court under that section. It was held in a large majority of cases that, if the person denied liability, no order could be made under the section, but in a few other cases, the court proceeded to examine other witnesses also and to adjudicate on the claim. Similarly S. 7, P-t. I. A., 1909, was interpreted by the Madras High Court as giving the insolvency court jurisdiction to decide disputed questions of title on a garnishee summons against third persons (1). The view of the Madras High Court on S. 7, P-t. I. A., and the wide interpretation which was put on the powers of the court under S. 36, P-t. I. A., led to the amendment of section 7 as well as section 36 of the Presidency-towns Insolvency Act by the Act of 1927. The legislature brought section 36 into line with section 25, B. A., of 1914, so that now, after the amendment, the insolvency court has no jurisdiction to make an order against a debtor or a person in possession of the insolvent's property unless the liability is admitted (2). At the same time a proviso was added to section 7. It is: "Provided that, unless all the parties otherwise agree, the powers hereby given shall, for the purpose of deciding any question under section 36, be exercised only in the manner and to the extent provided in that section." The joint effect of the amendments of section 36 and section 7 by the Presidency-towns Insolvency (Amendment) Act, 1927, is that, under the Presidency-towns Insolvency Act, the powers of the insolvency court have become very limited. The bearing of the history of the law under the Presidency-towns Insolvency Act on the interpretation of the Provincial Insolvency Act is this. S. 4, P. I. A., is identical with S. 7, P-t. I. A., as it stood before the amendment; and sub-sections (4) and (5) of section 36, as they stood before the amendment, were not reproduced by the legislature in 1926, while enacting the present section. S. 4, P. I. A., has been interpreted by the courts in a very wide sense and in numerous cases the court has assumed power to decide disputed questions of title against third persons. If the omission of provisions, similar to sub-sections (4) and (5) of S. 36, P-t. I. A., as it stood before the amendment, from the Provincial Insolvency Act was deliberate, it is an indication that the legislature intended that the insolvency courts are not to exercise those powers, i.e., those mentioned in sub-sections (4) and (5) of S. 36, P-t. I. A., before the amendment. But the legislature appears to have overlooked the view of the High Courts in regard to section 4. There can be no doubt that the Madras view, which it took in regard to S. 7, P-t. I. A., as it stood before the amendment, will be taken in regard to S. 4, P. I. A., and it has in fact been taken in many cases. What the Provincial Insolvency Court cannot do under section 59A, can, it is presumed, be done by proceedings under section 4. The conflict of opinion which existed on S. 7, P-t. I. A., before 1927, still exists on S. 4, P. I. A., 1920, and the way which the legislature has adopted in enacting section 59A, will, it is submitted, be not taken as conclusive proof for saying that section 4 is now to be interpreted as if there was a

(1) See *Doriappa Iyar v. Official Assignee*, (1922) 42 M. L. J. 141 : 65 I. C. 244; A. I. R. 1921 Mad. 456; *Abdul Khadar v. The Official Assignee of Madras*, (1917) 40 Mad. 810 : 36 I. C. 524; A. I. R. 1917 Mad. 832.

(2) See, however, *Mrs. Evelyn Popali v. Official Assignee of Madras*, A. I. R. 1937 Mad. 775, where it has been held that the examination of a person in possession of property, the ownership of which is in dispute, does not bar proceedings under S. 7, P-t. I. A.

S. 59A. proviso similar to that of S. 7, Part I A, added to it. The position under the Provincial Insolvency Act is still anomalous and objectionable, and only the legislature can clarify it.

Object.—The object of the section is sufficiently clear from the passage which has already been quoted from the Civil Justice Committee's report. The primary object of the section is to obtain information about the insolvent's property and his dealings. "It is of the utmost importance that the trustee in bankruptcy should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors, if he were compelled to rely only upon such information as the bankrupt may be able or willing to give, or as he can ascertain from persons ready to assist him voluntarily. Without it, he would frequently be compelled to choose between abstaining from insisting upon a claim to property which he is probably entitled to and commencing proceedings without knowing whether they are justified by the facts (1). The section, which is generally called the private examination section, is to be usually used by the trustee to make up his mind whether it is necessary to litigate or not and to enable him to inform himself whether the circumstances in connection with the debt or transfer are such as would entitle him to embark upon litigation.

Power discretionary, when it should and should not be exercised.

—The section confers very wide powers on the court. As a matter of fact the only limitation imposed by the section is the control of the court in allowing or disallowing the examination asked for by the trustee or a creditor.

Wilful disobedience of an order under the section may be followed by very serious consequences (2). In view of such possibilities the court should act with great caution and afford all possible facilities to the persons concerned (3). Orders made under the section are purely discretionary. They are intended to be made for the benefit of the general body of creditors and to enable the official assignee to establish his rights against the creditors, or the creditors in the insolvency who are brought upon the scene by means of fraudulent preferences and fraudulent practices resorted to prior to the insolvency, and who usually are the relatives and the friends of the insolvent. The law never contemplated that the provisions of section 36 should be used for the purposes of fishy cross-examination in order to prepare for future litigation (4). Nor does the section contemplate a roving enquiry into the affairs of the insolvent, but it is to be used only where the official assignee desires to enquire or search out facts before trial (5). The mere fact, however, that the examination may result in litigation against the person examined or the mere fact that an admission of liability is not likely to be made in the examination is no ground what-

(1) Wace on Bankruptcy, p. 84.

(2) *Origanti Venkatarathnam v. R. Desikachari*, A. I. R. 1919 Mad. 632 : 52 I. C. 448.

(3) *Sukhlal Karnani v. Official Assignee of Cal.*, 66 I. C. 890 : 34 C. L. J. 351 : A. I. R. 1921 Cal. 150.

(4) *Haji Dada-Nur Mahomed v. Ismailkarim*, A. I. R. 1929 Bom. 280 (2) : 118 I. C. 794, *Bank of India, Ltd., v. Pheroze Shah Petit*, A. I. R. 1938 Bom. 302.

(5) *Jaggiwan Keshowji*, in the matter of, 152 I. C. 878 : A. I. R. 1934 Sind 158.

ever for refusing a direct examination (1). The application under the section should fully set forth the grounds on which it is based. A mere allegation that the witness is likely to give useful information is not enough for an order under this section (2). **S. 59A.**

Where the official receiver has already commenced litigation, he must be content as a rule with the ordinary facilities for discovery and he should not be allowed to cross-examine his opponent under the private examination section (3). Thus where a mortgagee had brought his suit successfully to realise his security and the official assignee as a defendant in that case had already taken further steps to get the decree set aside, his application under the section for the examination of the mortgagee was disallowed (4). The reason is that powers under the section are not to be used as an extra method of discovery in addition to the ample facilities for it enjoyed by the ordinary litigants under the Code of Civil Procedure. This is, however, the general rule and the principle cannot be regarded as a rule of law. Thus in exceptional circumstances a trustee was allowed to examine a respondent to a motion already served (5). The section is also not to be used for the object of furthering criminal proceedings against the persons to be examined (6). The examination will not be allowed where it is really for the benefit of an applicant or for a creditor only and not for the general body of creditors (7).

In some cases it appears to have been held that the section is not intended for the purpose of enabling the official assignee to procure evidence or proof of his case by cross-examining the person to whom the insolvent appears to have transferred his property (8). The statements of law made in these cases are rather couched in general language and they need qualification. One of the objects of the private examination section is to enable the official assignee to obtain information about the dealings of the insolvent in the matter of transfers, etc., (9). The mere fact that the information is required for enabling the receiver to decide as to whether he should embark on a litigation or not is not a ground for not using the section. At the same time, the court must see that the section is not abused and that the persons sought to be examined are not annoyed or harassed.

Who can apply.—Under the English section, the court is to act on the application of the official receiver or trustee. Notwithstanding the

(1) *Bank of India, Ltd., v. Pherozeshah*, A. I. R. 1933 Bom. 309: 57 Bom. 665: 145 I. C. 648.

(2) *Haripad Rakhsh, in re*, 40 I. C. 94: 44 Cal. 374: A. I. R. 1917 Cal. 115.

(3) *Re Franks, ex parte* (Hiltings, (1892) 1 Q. B. 616; *In re Desportes*, 10 Mor 40: 68 L. T. 233; *Re Bhagwan Dass v. Nirotom Das*, 23 Bom. 447.

(4) *Kumar Sarat Kumar Ray v. Nabin Chandra Ramchandra*, A. I. R. 1928 Cal. 786, Full Bench: 115 I. C. 23: 56 Cal. 667.

(5) *Re Easton*, 8 Mor 168 at page 171; *Re Aarons*, 111 L. T. 411.

(6) *Sukh Lal Karnani v. Official Assignee of Calcutta*, 66 I. C. 890: A. I. R. 1921 Cal. 150.

(7) *Re Easton*, 8 Mor 168; *Re Desportes*, 10 Mor 40.

(8) In the matter of *Ghanchi & Sons*, A. I. R. 1930 Rang. 32: 121 I. C. 772: 7 Rang. 676; *In re Mahomed Ismail Fazla*, A. I. R. 1925 Bom. 329: 88 I. C. 77; *Nur Mahomed v. Ismail Karim*, A. I. R. 1929 Bom. 230 (2): 118 I. C. 794.

(9) *Goolbai Petit, in re*, 57 Bom. 665: 145 I. C. 648: A. I. R. 1933 Bom. 309.

S. 59A. fact that only the official receiver or trustee is mentioned as a person competent to make the application, it has been held that it is not only the trustee alone who has got that right (1). The trustee himself might be summoned for examination at the instance of a creditor (2); but where it is desired to examine the trustee it seems that notice of the application should be served on him (3). In one case a creditor was ordered to be examined in special circumstances at the instance of the bankrupt (4). Still the general rule remains that it is the official assignee or the receiver who should ordinarily make the application. Where the application is made by the receiver, it shall usually be granted (5). Where the application is made by any person other than the receiver, such applicant is bound to show a *prima facie* probability that some benefit will result to the estate or to the creditors from the proposed examination (6). The examination will not be allowed where it is really for the benefit of the applicant or of a creditor only (7). Under the Indian Acts, the trustee or any creditor, who has proved his debt, has been given the right to apply. Following the English practice, however, it is reasonable to presume that the court may order the examination of a person even in India on the application of a person other than those mentioned in the section.

There is a conflict of opinion as to the meaning of a creditor who has proved his debt. It was held in a Calcutta case that, unless the debt is admitted by the official assignee, though the proof has been lodged or though his name is included in the schedule filed by the insolvent, the creditor cannot be said to have proved his debt (8). This view has, however, been dissented from in a subsequent case of the same High Court. There it has been held that the expression "creditor who has proved his debt" means a creditor who has lodged the necessary proof of his debt and is entirely independent of the question, either of acceptance or rejection of that proof by the official assignee (9). It is submitted that the latter decision is correct.

Who can be summoned.—Section 25 (b) of 1914 and S. 36, P-t. I. A., 1909, expressly mention the debtor as one of the persons who can be summoned. He is not mentioned in section 59 A. The omission, however, is not material, as the court can order the examination of the debtor himself under the general powers which it has under other sections of the Act. For instance, see section 28, sub-section (1) and section 22. Under the section the court may summon (1) any person known or suspected to have in his possession any property belonging to the insolvent, (2) any person supposed to be indebted to the insolvent, or (3) any person who may be capable of giving information respecting the insolvent or his dealings or property (10). The section is so widely worded that it practically covers

(1) *Exp. Swift*, 26 L. T. 226, decided under S. 96 of the Act of 1869.

(2) *Exp. Crossley*, L. R. 13 Eq. 409.

(3) *Re Whicher*, 5 Mor 178.

(4) *Exp. Austin*, 4 Ch. D. 13.

(5) *Haji Dada Nur Mahomed v. Ismail Karim*, A. I. R. 1929 Bom. 230 (2) : 118 L. C. 794.

(6) *Exp. Nicholson*, 1880. 14 Ch. D. 243.

(7) *Re Easton*, 8 Mor 168 : *Re Desportes*, 10 Mor 40.

(8) *Abdul Samad, in re*, 70 I. C. 468 : 26 C. W. N. 744 : A. I. R. 1928 Cal. 805.

(9) *Krishna v. Rash Mohan*, 57 Cal. 864 : A. I. R. 1929 Cal. 703 : 128 I. C. 652.

(10) *Dinaram Somani v. Bhim Bahadur Singh*, 82 I. C. 76 : A. I. R. 1928 Cal. 427.

the case of every person whom the court wants to examine under the section. The person who is so summoned is not a witness for all purposes. The provisions of Civil Procedure Code relating to witnesses do not apply to the case of a person summoned under the section. Thus a person residing at a distance of more than 200 miles can be called (1). The court may summon a pardanashin lady who is known or suspected to have in his possession property belonging to the insolvent, as S. 132(1), C. P. C., does not apply (2). A Full Bench of the Madras High Court has held, in a case under the Presidency-towns Insolvency Act, that the court can issue a garnishee summons to a person supposed to be a debtor to the insolvent's estate, even though he resides over 200 miles distant from the court (3).

The power to summon a person can be exercised by the court even after discharge. The reason is that even after discharge the court retains control over the property of the insolvent (4).

In a Madras case the circumstances were somewhat peculiar and the power under the section was not exercised. It was held that, in a case of joint Hindu family where a father is largely indebted and becomes an insolvent, what vests in the receiver is that father's share itself and not the son's share in the property itself, that his power of sale terminates with the severance of the joint family status and that the insolvency court has no jurisdiction under section 36 to summon the son at the instance of the official assignee who wants to decide the binding nature of the debt between the father and the son. The ground of the decision was that no suit for partition can ever be filed in the insolvency court by the official assignee and the liability of the son's share to pay off the debts of the father cannot be treated as a money claim in favour of the father (5).

Conduct of the examination.—The examination under this section is held in private before the court or its officer (6). When a witness is examined under the section the insolvent has no right to be present (7). Also it would seem that even a creditor has no right to attend the examination without leave (8). The examination may be ordered to be taken at the witness's residence (9). In theory, it is to be observed, the examination is to be conducted by the court itself (10). In practice, however, the court may authorise the official assignee, or even a creditor. Where an examination is being conducted under this section, it is the duty of the court to exercise some control over

(1) *Re Bilasrao Ji Serogi*, 56 Cal. 835 : A. I. R. 1929 Cal. 528 : 121 I. C. 635.

(2) Official assignee of *Mad. v. G. Ramujaya*, 110 I. C. 606: A. I. R. 1928 Mad. 856.

(3) *Shadan Chandra Bhandari v. Shew Narayan Golaba Rai*, 147 I. C. 191 : 60 Cal. 936 : A. I. R. 1933 Cal. 699.

(4) *Shadan Chandra Bhandari v. Shew Narayan Golaba Rai*, 37 C. W. N. 718 : 57 C. L. J. 467 : 60 Cal. 936 A. I. R. 1933 Cal. 699.

(5) *Krishna Murthy Pillai v. Sundara Murthi Pillai*, A. I. R. 1932 Mad. 381 : 55 Mad. 558 : 138 I. C. 225.

(6) *Re Whicher*, 1888, 5 Mor 173.

(7) *Re Beall*, 1924, 2 Q. B. 135.

(8) See *Re Norwich Fire Insurance Co.*, 1884, 27 Ch. D. 515, a case under s. 115 of English Companies Act, 1862.

(9) *Re Bradbrook*; 23 Q. B. D. 226.

(10) *Re Scharrer*, 20 B. D. 518 at p. 522, per Fry.

S. 59A. the persons who are conducting it. If the questions put to the witness are such as ought not to be put or are clearly irrelevant or calculated to mislead the witness, it is the duty of the court to interfere (1). Where the examination is being conducted before an officer of the court, it shall be for him to decide the propriety or relevancy of a question put to the witness. In this respect the law under the Presidency towns Insolvency Act is different. There if the witness refuses to answer on the ground that the question is improper, the officer shall report the refusal to the court and the court shall decide whether the witness should be compelled to answer the question or not (2). A person examined as a witness under this section is entitled to all the privileges conferred on a witness by the Indian Evidence Act, 1872, and he cannot be compelled to answer any question which that Act allows him not to answer (3).

What the witness must answer. As stated in the preceding paragraph, the witness is bound to answer all questions which can be put to him under the Indian Evidence Act. Again, the questions are relevant so long as they are necessary, in the opinion of the court, to bring out the real facts of the case (4). The object is to obtain information about the insolvent, his dealings or property and, so long as the questions relate to those matters, they must be answered. It is enough that the questions are so related; it is not necessary that they should be related directly to the insolvent's property (5). Thus the witness was held bound to answer the question as to where the bankrupt's father was residing, where he had admitted that he had the required information (6). A witness cannot, however, be ordered to furnish an account in writing, and not on oath, of money transactions between himself and the bankrupt, or of property of the bankrupt received by him (7).

In England, a witness is excused from replying to any question the answer to which will have a tendency to expose the witness or the wife or husband of the witness, to any criminal charge, penalty or forfeiture. The rule in India is different and is contained in section 132, Indian Evidence Act, 1872, which runs as follows :—

“A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer.

(1) *Re Pennington*, 1888, 5 Mor 216, 268; *Re Tillet*, 1890, 7 Mor 286, 291.

(2) *Sukhlal v. Official Assignee of Cal.*, 66 I. C. 890; A. I. R. 1921 Cal. 150.

(3) *Re Vijiarangan Naidu*, A. I. R. 1929 Mad. 183; 114 I. C. 836.

(4) *Re Scharrer*, 20 Q. B. D. 518, 522.

(5) *Exp. Vogel*, 1818, 2 B. & Ald. 219; 106 E. R. 347.

(6) *Exp. Campbell*, L. R. 5 Ch. 703.

(7) *Exp. Reynolds*, 81 Ch. D. 601.

Following the Indian rule, it has been held that the witness will not be excused from answering any question on the ground that it will tend to criminate him (1). **S. 59A.**

The English rule or the Indian rule, as stated in S. 132, I. E. A., has no application where the person examined under the section is the insolvent. He will not be entitled to any such protection in relation to a question put to him touching his property, the reason being that he is under a personal obligation to make a full disclosure of his property (2).

It is provided by the section that the witness so summoned is to be tendered a reasonable sum to defray the expenses incurred by him for such attendance. He is not bound to come before the court, if the costs are not paid. It shall be within the discretion of the court to decide the amount of the costs.

Use of the deposition against him.—The general rule both in India and in England is that the answers given by a witness at the private examination are evidence against him in any proceeding, whether in insolvency or in a civil suit, on exactly the same principles (3). In England it is also held that if the deposition of a witness is sought to be used in bankruptcy, and the deposition is on the file, notice should be given of intention to read it (4). Observations to the same effect have been made in a Calcutta case (5).

The deposition of the insolvent under the section made without any objection on his part is voluntary and is admissible under S. 103, P-t. I. A., in a trial for criminal offences specified in that section, as an admission under section 17, Indian Evidence Act, unless it is excluded by sections 18 to 21, Indian Evidence Act (6). In a later case of the same High Court, it has, however, been held that the statement of the insolvent under S. 36, P-t. I. A., is inadmissible in evidence in a criminal case under S. 103, P-t. I. A. (7). It is submitted that the view taken in *Joseph Perry's* case is correct and is in accordance with the English case of *Reg v. Widdop* (8), where it was held, under section 97 of the Bankruptcy Act, 1869, corresponding to the present section, that it may be used against him in a subsequent indictment for obtaining property on credit under the false pretence of dealing in the ordinary way of his trade. Section 166, Bankruptcy Act, 1914, introduced a change in England, making the statement of admission made by any person in any compulsory examination or deposition before any court in the hearing of any matter of bankruptcy, inadmissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in section 43, sub-

(1) *Sukh Lal v. Official Assignee of Cal.*, 1921, 34 C. L. J. 355: 66 I. C. 819: A. I. R. 1921 Cal. 150.

(2) *Exp. Schofield*, 6 Ch. D. 230; *Re Joseph Perry*, 1919, 46 Cal. 996, 1000: 54 I. C. 478: A. I. R. 1920 Cal. 170.

(3) *Exp. Hall, in re Cooper*, 19 Ch. D. 580; *Jnanendra Bala Debi v. Official Assignee Cal.*, 93 I. C. 834: 54 Cal. 251: A. I. R. 1926 Cal. 597.

(4) *Exp. Hall, in re Cooper*, 19 Ch. D. 580.

(5) *Madho Ram Raghunath v. The Official Assignee*, 27 C. W. N. 611: A. I. R. 1923 Cal. 631: 85 I. C. 984, explained by the same judge in A. I. R. 1926 Cal. 597 *supra*.

(6) *Joseph Perry v. Official assignee Cal.*, 47 Cal., 254 A. I. R. 1920 Cal. 941, confirming the decision of Rankin, J., in *Re Joseph Perry*, 54 I. C. 478: 46 Cal. 996: A. I. R. 1920 Cal. 170.

(7) *Moti Lal v. Emperor*, A. I. R. 1929 Cal. 80: 113 I. C. 851.

(8) 1872, 27 L. T. 693

S. 59A. section (3), Larceny Act, 1916. Except for this exception, it leaves the bankrupt exposed to conviction on his own evidence for a great number of offences. The deposition is, however, not admissible against any person other than the deponent; the deposition of the insolvent alienate from the insolvent under the section is not evidence against a subsequent alienate from the deponent (1).

Production of documents.—The section gives the court not only the power of summoning any person for the purpose of examining him but it may also require any such person to produce any document in his custody or power, relating to the insolvent or his dealings or property. The power is a wide one and disobedience to the court's order involve the person concerned in grave consequences. The court should, therefore, act with great caution and afford all possible facilities to the person concerned to satisfy the court that at the time of the order the books were either not in existence or were not under his control (2). The court has jurisdiction to order a person to produce for the inspection of the trustee all documents and papers relating to the estate of the debtor and the procedure under this section is only one of the methods of discovery open to the trustee (3). The question whether a document relates to the bankrupt, his dealings or property is a question which the court should decide (4). The court should not order the production of a document unless a strong *prima facie* case is made that it relates to the property of the bankrupt (5). Thus a mortgagee from the bankrupt was held bound to produce his mortgage deed (6); and in another case a witness was not asked to hand over drafts of accounts between the witness and the bankrupt, prepared by the witness for his own use, to be retained by the official receiver for the purpose of making copies (7). A solicitor cannot refuse to produce documents of the bankrupt for examination by the trustee on the ground of a lien for professional services rendered before the bankruptcy (8). In another case the court refused to order the servant of a person, alleged to have had dealings with the bankrupt, to produce documents which he had not his master's authority to produce (9). On an application under section 115 of the English Companies Act, 1862, it was held by the trial judge that the Board of Indian Revenue ought not to be compelled to produce balance sheets of a company delivered to a surveyor of taxes for the purpose of assessment to income-tax (10).

Sub-section (3).—In England the practice is that the witness is allowed in the examination to be represented by counsel or solicitor. There, however, it is doubtful as to when this is a matter of right (11). In India the right to be so represented is given by the statute.

(1) *Umesh Chander Seal v. Falkner*, 138 I.C. 741; A.I.R. 1932 Cal. 621.

(2) *Sukh Lal Karnani v. Official Assignee of Calcutta*, 66 I. C. 890; A. I. R. 1921 Cal. 150.

(3) *Re Geiger*, 109 L. T. 224.

(4) *Exp. Tatton*, 17 Ch. D. 512.

(5) *Exp. Smith*, 45 L. T. 447.

(6) *Exp. Caldecott*, (1880) Mont. 55; *Re Marks' Trust Deed*, L. R. 1 Ch. 429.

(7) *Re Ash*, 21 Mans. 15.

(8) *Re Toleman*, 13 Ch. D. 885. See also Bankruptcy Rule 383.

(9) *Re Higgs*, 66 L. T. 296.

(10) *Re Joseph Hargreaves*, 1903, 1 Ch. 347.

(11) *Exp. Waddell*, 6 Ch. D. 333; *Exp. Kemp*, 43 L. J. Bank. 26.

The witness is only entitled to his ordinary expenses and not to the costs of employing a solicitor or counsel (1). If sufficient conduct money has not been tendered, the witness cannot be committed for not attending nor can a warrant be issued to compel his attendance (2). **S. 60.**

Practice.—The general practice is that the official assignee or receiver makes an application to the court or officer for the examination of a person and if it or he is satisfied, by an affidavit or otherwise, that there are sufficient grounds, it may grant the application *ex parte* (3). The person so summoned is entitled, as of right, to appear by counsel and, after giving notice to the other side, to object to the order on the ground that it was erroneously made (4). The person against whom an *ex parte* order for his examination has been made by the court, may apply to the court for reconsidering its decision on the principles laid down in O. 9, r. 13, C. P. C., or, instead of applying to the court, he may appeal from that order. But if the court has refused to direct a witness to answer a particular question, the witness cannot be made respondent to an appeal filed by the applicant (5). The proper course of an applicant who is dissatisfied with the disallowance of a question is to apply to the court for an order for the further attendance of the witness for the examination, and if such application is refused, to appeal from the refusal (6).

Courts empowered under the section.—The powers under the section cannot be exercised by every insolvency court exercising jurisdiction under the Act. The court which can exercise these powers must be specially empowered on this behalf by an order of the Local Government. This restriction is imposed in pursuance of the recommendation of the Civil Justice Committee. By notification Nos. 6956-J and 6964-J, dated the 6th August, 1927, published in the Calcutta Gazette, Part I, dated 18th August, 1927, the district courts of the following districts in Bengal have been empowered to perform the functions referred to in section 59A:—24 Pargannas, Burdwan, Midnapore, Hooghly, Additional District Judge's Court of Hooghly, Dacca, Rajshahi and Dinajpore.

60. (1) In any local area in which a declaration has been made under section 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricul-

Special provisions in regard to immovable property. p r o -

(1) *Exp. Waddel supra*. In the matter of Amshu Prokash Ghosh, 53 I. C. 362 : 46 Cal. 795 : A. I. R. 1920 Cal. 648 ; Kumar Sarat Kumar Ray v. Nabin Chandra, 115 I. C. 29 : 56 Cal. 667 : A. I. R. 1928 Cal. 786, full bench.

(2) *Re Batson*, 1 Mans. 45. - See also B. R. 71, 72.

(3) Sukhlal Karnani; Bahadur v. Official Assignee, Calcutta, 66 I. C. 715 : 48 Cal. 1089 : A. I. R. 1921 Cal. 58 ; *In re Kissory Mohan*, 44 Cal. 286 : 36 I. C. 990 : A. I. R. 1917 Cal. 628.

(4) *Re Maneckji Cawasjee* (1906) 8 B. L. R. 85 ; Sailendra Krishna Roy v. Nabin Chandra, A. I. R. 1928 Cal. 786 : 56 Cal. 667 : 115 I. C. 29.

(5) *Re Scharrer*, 20 Q. B. D. 518.

(6) *Re Scharrer*, per Lord Esher, M. R.

S. 60. tural purposes shall be made by the Receiver; but, after the other property of the insolvent has been realized, the Court shall ascertain—

(a) the amount required to satisfy the debts proved under this Act after deducting the moneys already received;

(b) the immoveable property of the insolvent remaining unsold; and

(c) the incumbrances (if any) existing thereon; and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by paragraphs 2 to 10 of the Third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immoveable property; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order.

History.—This is section 21 of the Act III of 1907 except for the difference that the references in the old section are to the Code of Civil Procedure, Act 14 of 1882, which has since then been repealed by the Code of Civil Procedure, 1908.

Object.—The object of the section is to assimilate the proceedings in insolvency to those under the Code of Civil Procedure as regards agricultural immoveable property. The object of the section therefore is the same as that of section 68. "The object of these provisions, *i. e.*, provisions relating to the execution of decrees by Collectors is well-known. In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land-holders without the immediate sale of their estate and so to preserve the old landed gentry of the country. The provisions of sections 320 to 325 (c) (now sections 68, 70, 71 and 72 and Schedule 3) were

inserted in the Code of Civil Procedure, in order to give effect to these suggestions" (1). S. 60
(1) (2).

Sub-section (1).—Section 68, C. P. C., runs as follows :—

"The Local Government may declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector."

Such a declaration is in force in U. P. and Oudh. A sale held by the receiver of immovable property paying revenue to the Government is illegal and void, where such a declaration is in force (2). Not only that the insolvency court has no jurisdiction to order the sale of revenue paying immovable property but also, after the sale proceedings have been transferred to the Collector under section 60, it has no authority of any kind to interfere with the proceedings of the sale officer or to sanction a sale made by the Collector or his subordinate, nor has the sale officer any authority to refer the case to the insolvency court and to ask for sanction (3). In another Allahabad case, in somewhat peculiar circumstances, the difficulty of the receiver's inability to sell revenue paying immovable property was got over. During the pendency of the insolvency proceedings, the receiver and the secured creditors referred the matter to arbitration and the award directed the receiver to bring the insolvent's property, which was ancestral and revenue paying, to sale and realise the sale proceeds through court. It was held that the better way would be to obtain the insolvent's discharge under section 38 and deal with the property outside the jurisdiction of the insolvency court and that the receiver would then cease to be a receiver in insolvency but, being a person vested by the arbitrator with authority to sell the property under the arbitration provision, would be able to sell the property under the terms of the award (4).

No declaration under section 320 of the Code of Civil Procedure, 1882, (corresponding to section 68 of the Code of 1908), is in force in the Punjab and therefore sub-section (1) of section 60 of the Act has no application to that area (5).

Sub-section (2).—Sub-section (2) makes the insolvency proceedings subject to the same prohibitions or restrictions, which exist for the execution of decrees and orders of the civil court against immovable property. An order of adjudication is to be considered a decree or order for that purpose and its enforcement is to be taken equivalent to execution. The Punjab Alienation of Land Act is an enactment which interdicts the sale of the land of a particular class of judgment-debtors in execution of decrees passed against them. Section 16 of that Act provides that no land belonging to a member of an agricultural tribe,

(1) *Huro Prasad Roy v. Kali Prasad Roy*, 1883, 9 Cal. 290 at page 294.

(2) *Nazir Hassan v. Matinuz-Zaman*, 11 O. L. J. 672 : A. I. R. 1925 Oudh 299.

(3) *Girdhari Lal v. Jhaman Lal*, 98 I. C. 1046 : 49 All. 272 : A. I. R. 1927 All. 203.

(4) *Ram Devi v. Ganeshi Lal*, 95 I. C. 416 : 48 All. 475 : A. I. R. 1926 All. 501.

(5) *Manji v. Girdhari Lal*, 61 I. C. 664 : 2 Lah. 78 : A. I. R. 1921 Lah. 44.

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(2).

who has been notified as such by the Local Government under the Act, shall be sold in execution of any decree or order of any civil or revenue court, whether made before or after the commencement of the Act. The insolvency court's powers in dealing with the immoveable property of such an insolvent is subject to section 16 of the Punjab Alienation of Land Act. The reason is that a sale of property under S. 59, P. I. A., 1920, by the receiver is one of the modes in, and the receiver the agency by, which the order of adjudication is enforced (1). The insolvency court, however, has the same powers which a civil court will have under the Punjab Alienation of Land Act. It will not have the same powers which the insolvent himself would have. In two Lahore cases, it was observed that the receiver has the power to sell the land of an agriculturist in the same manner and subject to the same restrictions as the insolvent himself could have sold it, and as the insolvent could have voluntarily sold his land to a member of a notified agricultural tribe in the same group, the receiver also can do the same (2). This view was, however, dissented from in *Mirza v. Jhanda Ram* (3), on the ground that those rulings ignored the effect of section 60, sub-section (2), P. I. A., 1920, which restricts the general powers of the receiver, got by him as representing the insolvent in dealing with his property.

The next point for consideration is as to what the powers of the receiver are in relation to the property of a member of an agricultural tribe in the Punjab. In some cases it was argued that the immoveable property of an agriculturist does not vest in the receiver at all as it is exempt under section 28 (5), P. I. A., 1920, read with section 60, C. P. C., but this argument was overruled on the ground that the words "attachment and sale" in section 60, Civil Procedure Code, are not to be read as "attachment or sale" but that the expression is to be given its plain grammatical meaning (4). It is, therefore, competent to the insolvency court to effect a temporary alienation by way of mortgage of the land of a member of an agricultural tribe, who has become an insolvent, because the property vests in him under section 28 (2), and because the ordinary civil court has that power (5). In exercising the powers of temporary alienation, the insolvency court should, however, proceed, as far as possible, on the same lines as a court in execution of a decree. In execution of decrees against the lands of indebted members of agricultural tribes, who are often actually or practically insolvent, it has always been the practice sanctioned by the Lahore High Court, that the debt should be liquidated by a farm terminable after a reasonable period and the maximum period for which a farm should be permitted is 20 years. By the arrangement of such a farm or a

(1) *Mirza v. Jhanda Ram*, A. I. R. 1930 Lah. 1034 : 130 I. C. 419 : 12 Lah. 367 ; *Bahadur Khan v. Official Receiver*, A. I. R. 1936 Pesh. 109.

(2) *Jaimal v. Chanan Mal Chauthmal*, A. I. R. 1928 Lah. 734 : 115 I. C. 475 ; *Alam Shah v. Paira Ram*, (1929) 119 I. C. 730.

(3) A. I. R. 1930 Lah. 1034 : 130 I. C. 419 : 12 Lah. 367.

(4) *Manji v. Girdhari Lal*, A. I. R. 1921 Lah. 44 : 61 I. C. 664 : 2 Lah. 78 ; *Mirza v. Jhanda Ram*, 12 Lah. 367 : A. I. R. 1930 Lah. 1034 : 130 I. C. 419 and the cases cited therein.

(5) *Manji v. Girdhari Lal*, A. I. R. 1921 Lah. 34 : 61 I. C. 664 : 2 Lah. 78 ; *Mirza v. Jhanda Ram*, A. I. R. 1930 Lah. 1034 : 12 Lah. 367 : 130 I. C. 419 ; See also *Datar Kaur v. Ram Rattan*, A. I. R. 1920 Lah. 456 : 1 Lah. 192 : 58 I. C. 603, where it was held, after an exhaustive review of authorities, that an executing court can make a temporary alienation of the land of agriculturists.

mortgage, which is automatically redeemed by the profits, the debt is automatically extinguished (1). It is, however, only a rule of guidance and not a rule of law. There is no absolute bar to the insolvency court permanently alienating the land of an insolvent or to its departing from the principles governing the execution of ordinary decrees if a fit case is made out for such action (2).

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This was the law prior to the Punjab Act I of 1931, which amended the Punjab Alienation of Land Act by inserting sub-section (2) in section 16. It runs as under :—

“Notwithstanding anything contained in any other enactment for the time being in force, no land belonging to the member of an agricultural tribe shall in execution of any decree or order of any civil or revenue court whether made before or after the commencement of this sub-section, be leased or farmed for a period exceeding twenty years or mortgaged except in one of the forms permitted by section 6.”

It has been held by the Allahabad High Court that the Provincial Insolvency Act does not apply at all so as to govern or affect the rights of a land-holder against his tenant, which are enforceable by means of any suit or proceeding under the Agra Tenancy Act. The jurisdiction of the civil courts strictly so called and of the insolvency court respectively on the one hand and of the revenue court on the other, are mutually exclusive (3).

Let for agricultural purposes—S. 68, C. P. C., is quite general in its scope. The declaration under that section need not necessarily be confined to property paying revenue to the Government or held or let for agricultural purposes. Under S. 60, P. I. A., 1920, the jurisdiction of the insolvency court appears to be barred in respect of only that immovable property which is paying revenue to the Government or held or let for agricultural purposes, and in respect of which a declaration under section 68 is in force. Immovable property which is not revenue paying or used for agricultural purposes is liable to be sold by the receiver, even though there is a declaration under S. 68, C. P. C., in respect of that kind of immovable property. As far the meaning of the expression “held or let for agricultural purposes” it may be noted that there are various enactments in which similar expressions are used. Agricultural purposes must be for the purpose of cultivating the soil. Where the object of the occupation was the dwelling house and where the cultivation of the soil, if any, was entirely subordinate thereto, it was held that the land was not used for agricultural purposes (4). The manufacture of indigo cakes from indigo plants is not an agricultural purpose (5). Lands on which potatoes, grain, vegetables, etc., are grown as well as pasture lands are used solely for agricultural purposes (6).

(1) *Manji v. Girdhari Lal*, A. I. R. 1921 Lah. 44 : 61 I. C. 664 : 2 Lah. 78.

(2) *Lachhman Singh v. Mahant Ram Das*, 117 I. C. 669 : A. I. R. 1929 Lah. 66 (a permanent alienation was made in this case).

(3) *Parbati v. Raja Sham Rikh*, 66 I. C. 214 : 44 All. 296 : A. I. R. 1922 All. 74.

(4) *Kali Kissan v. Janki*, 8 W. R. 250.

(5) *Surender Narain Singh v. Hari Mohan Missar*, 31 Cal. 174, (case under Specific Relief Act, section 54 illustration (k) and Bengal Tenancy Act sections 23, 25 (a) and 188).

(6) *King Emperor v. Alexander*, 25 Mad. 627 (case under Madras District Municipalities Act, section 63 (3)).

Distribution of Property.

S. 61. **61.** (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—
 Priority of debts.

(a) all debts due to the Crown or to any local authority; and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule.

History.—This is section 33 of the Act 3 of 1907. It is based on section 40 of the Statute of 1883, as supplemented by S. 1 of the Preferen-

tial Payment in Bankruptcy Act, 1888. Section 356 of the Insolvency Chapter of the old Code of Civil Procedure did not give any priority to the wages of service or labour rendered to the insolvent. **S. 61 (1).**

Analogous Law.—The corresponding section of the Presidency-towns Insolvency Act is section 49. Its first sub-section is as follows :—

“(i) In the distribution of the property of the insolvent there shall be paid in priority to all other debts—

(a) all debts due to the Crown or to any other local authority ;

(b) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding three hundred rupees for each such clerk, and one hundred rupees for each such servant or labourer ; and

(c) rent due to a landlord from the insolvent : provided the amount payable under this clause shall not exceed one month's rent.”

Sub-sections (2) to (6) of S 49, P-t. I. A., are the same as the corresponding sub-sections of S. 61, P. I. A., 1920. The law as to priority of debts in England is now governed by S. 33, B. A., 1914, and section 2, Bankruptcy (Amendment) Act, 1926. The law in England is much more complicated, having regard to the peculiar economic conditions prevailing there. Sub-sections (2) (3) (6) (7) and (8) of S. 33, B. A., are in almost the same terms as sub-sections (2) (3) (4) (5) and (6) of S. 61, P. I. A., 1920. In England there are also provisions for postponing payment of certain debts to the payment of other debts (1). There are no such provisions in the Indian Acts.

Priority of debts under the Indian Companies Act is governed by S. 330, I. C. A., and not by bankruptcy rules (2).

Property of the insolvent.—The property of the insolvent is property which is divisible amongst the general body of creditors. Property which is not so divisible is not within the scope of this section and no question of priority in respect of such property can possibly arise. Property which is subject to a mortgage, charge or lien vests in the receiver only after such mortgage, charge or lien has been satisfied. In respect of such property, even if it is realised by a receiver in insolvency proceedings, the mortgage, charge or lien must first be paid, not because they are entitled to priority of payment but because the receiver takes the property subject to those burdens ; and it may be said that the sum necessary for discharging those burdens does not so vest in the receiver as to become divisible amongst the creditors. The payments which are made in virtue of a mortgage, charge or lien are, therefore, to be kept distinct from the payments made under the section. For instance, the rights of the Crown in respect of mortgaged property shall be exactly the same as that of any other person in dealing with a third party.

Sub-section (1); debts due to the Crown.—The right of the Crown to payment of a debt in priority to the debts of other creditors does not depend on the Insolvency Act. Section 61 (1) of the Act only declares a long established law that when the claims of the Crown and the claims of

(1) William's Bankruptcy Practice, pp. 151-152 and 209-213.

(2) Secretary of State v. The Punjab Industrial Bank, 12 Lah. 678, 32 P. L. R. 367 ; 134 I. C. 200 ; A. I. R. 1931 Lah. 351.

- S. 61 subjects as creditors are in competition, the Crown has priority (1). As
(1). to what are Crown debts see commentary under section 11.

Local authority. The expression 'local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to or entrusted by the Government with the control or management of municipal or local funds (2). The priority of debts due to any local authority shall extend, upon the insolvency of the father and the sons in a joint Hindu family, not only to the interest of the father alone but also to the interest of the sons, as they are liable to pay their father's suretyship debts (3).

The expression "debts due to Crown or local authority" means provable debts. They may be unascertained, provided they are provable. Thus an obligation incurred by a contract of indemnity in favour of a Port Trust has been held to be a debt due to that authority (4).

Clause (b); salary or wages.—In some old English cases it was held that where the payment was made by commission, it could not be the subject of preferential payment (5). In later rulings these cases were not followed and it was held that the commission part of the salary must also be paid in priority (6). The view of Justice Bigham has now been given legislative effect by the enactment of section 2 of the Bankruptcy (Amendment) Act, 1926, which expressly applies the section to any wages or salary, whether or not earned wholly or in part by way of commission. It is submitted that the same will be held in India. Salary does not include the prospective earnings of a professional man in the exercise of his personal skill and knowledge (7). The wages or salary must be in respect of personal services, earned by the clerk or servant, not those which he pays some one else to render (8). Persons who agree to spin cotton belonging to a spinning and weaving company and to receive a certain amount of money for a certain quantity of cotton supplied by them were held as labourers and their remuneration as wages within the meaning of section 266 of the Code of Civil Procedure, Act 10 of 1877 (9). The wages may be payable either for time or for piece-work.

Clerk, servant or labourer.—Under the old Acts, prior to the Act of 1914, it was held in England that the employment must have been something more than an occasional employment (10). A managing director

(1) *Patrivenkata Srinivas Rao v. Secretary of State*, A. I. R. 1935 Mad. 931; 157 I. C. 1007; 58 Mad. 1014; see also *Soniram Rameshwar v. Mary Pint*, A. I. R. 1934 Rang. 8; 11 Rang. 467; 147 I. C. 1014; *Rex v. Wells*, 1812, 16 East 268; *Re Henley & Co.*, (1878) L. R. 9 Ch. D. 469.

(2) Section 3 (28), General Clauses Act, 10 of 1857; *Official Assignee Madras v. Trustees of Port Trust Madras*, A. I. R. 1936 Mad. 789; 166 I. C. 427 (Port Trust is a local authority).

(3) *In re Assa Ram Moti Ram*, 126 I. C. 477; A. I. R. 1930 Sind. 244.

(4) *Official Assignee Madras v. Trustees of Port Trust Madras*, A. I. R. 1936 Mad. 789.

(5) *Exp. Simmons*, 30 L. T. (O. S.) 311; *Exp. Hickin*, 19 L. J. Bank 8.

(6) *Re Klein, exp. Goodwin*, 1906, 22 T. L. R. 664, per Bigham, J.

(7) *Exp. Benwell, re Hutton*, 1884, 14 Q. B. D. 301.

(8) *Cairney v. Back*, 1906, 2 K. B. 746.

(9) *Jechand Khushal v. Aba*, 5 Bom. 192.

(10) *Exp. Walter*, L. R. 15 Eq. 412; *Exp. Harcourt*, 31 L. T. O. S. 188; *Exp. Butler*, 1857, 28 L. T. O. S. 375.

was held not to be a clerk or servant within the meaning of the Act of 1888 (1), but a secretary who personally renders services to a company may be, the question apparently depending on the nature of his duties and the terms of his employment in each case (2). The fact that the labourer employed others under him, being paid himself wages calculated by the result of the labour performed, does not necessarily make him a contractor and not a servant (3). Thus a foreman who made bricks for and was paid at a price per thousand by the bankrupt, and who was liable to be discharged at a week's notice, was held to be a workman (4). In a very old Bombay case under section 266 of the Code of Civil Procedure, Act 10 of 1877, the learned judges adopted the distinction made by Baron Parke in *Ley v. Warden* (5), between a contractor and an ordinary labourer. It is this: "The reward, which he (the contractor) is to receive, is not to be paid for his personal labour, but it is the contract price from which he may derive his profit, by the assistance in labour of others. It seems to me that this Act (the Truck Act) was intended to be applied to those who engage to do work by their own personal labour, and that the object of it is to protect such man as earn their bread by the sweat of their brow, and who are, for the most part, an unprovided class, and that it was not intended to have any application whatever to persons who take work upon a great scale." (6).

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(1) (2)
(3) (4).

Sub-section (2)—The debts mentioned in section 61 are to rank equally between themselves and stand on the same footing. If the property of the insolvent is insufficient to meet them, they shall abate in equal proportion between themselves.

Sub-section (3).—The sub-section provides that the debts to which priority is given by the Act shall be paid as soon as possible. The word 'forthwith' used in the section indicates the intention of the legislature. Except for the sums which may be necessary for the expenses of administration or otherwise, the debts mentioned in sub-section (1) should be paid by the receiver immediately and so far as the property of the insolvent is sufficient to meet them. Liability to pay rent for premises occupied by a firm which is adjudicated insolvent, for the period after the order of adjudication, is to be counted towards the expenses of administration (7).

Sub-section (4) ; insolvency of partners.—The rule stated in the sub-section is what is generally called distribution of joint and separate estates. In the eyes of law the partnership or joint estate is distinct from the separate estate of each partner. The rule was laid down by Lord King in *Exp. Cook* (8) in the following terms :—

"That joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner;

(1) *Re Newspaper Proprietary Syndicate, Ltd.*, 1900, 2 Ch. 349.

(2) *Quirney v. Back*, (1906) 2 K. B. 746 and see *Re Beeton & Co., Ltd.*, 1913, 2 Ch. 279; *Re Ashley & Smith, Ltd.*, 1908, 2 Ch. 378.

(3) *Exp. Allsop*, 32 L. T. 433.

(4) *Re Field*, 4 Mor. 63.

(5) *R. I. Ley v. Warden*, 2 Exch. Report, 59.

(6) *Ley v. Warden*, 2 Exch. Report, 59 cited and followed in *Jechand Chaud Khusal v. Aba*, 5 Bom. 132.

(7) *Official Trustee of Bengal v. Kissen Gopal Behari*, 57 Cal. 1210 : 134 I. C. 91 : A. I. R. 1930 Cal. 459; *Mohammadi Begum v. Absan Ahsan & Co.*, A. I. R. 1937 Lah. 96 (rent was, as a fact, found due for the period before adjudication and not entitled to priority).

(8) 2 P. Wms, 500.

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(4).

and if there be a surplus of the joint estate besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors."

It was upon this rule that Lord Loughborough's celebrated order was founded, which was as follows :—

"And I do further order that the commissioner do cause distinct accounts to be kept of the joint estate, and also of such separate estate or estates and that what shall be found to belong to the separate estate or estates shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, that the share or shares, interest or interests of the bankrupt or bankrupts, who separate estate or estates is or are to be applied in manner before directed, in such overplus be carried to the account of his or their separate estate or estates, and be applied in or towards satisfaction of his or their separate debts; and in case there shall be any overplus of the separate estate or estates of such bankrupt or bankrupts, after all their separate creditors shall be paid and satisfied their whole demands, that the overplus of such separate estate or estates be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts; and that the costs of taking such accounts be paid out of such separate estate or estates, and be settled by the commissioner in case the parties differ about the same" (1).

In order to understand the rule embodied in the sub-section it will be useful to make a few observations explaining the law relating to firms and the partners *inter se* in the firm. The word 'firm' does not represent a legal or juristic person. It only means a collective name for a number of persons who have entered into partnership for carrying on any business. The firm has no legal existence, apart from its members. Still the conception of firm is a real one and is, in some respects, distinct from the partners who constitute the firm. The partnership or firm may have property separately allocated by the partners for the use of partnership only and a partner may have separate property of his own in the sense that that property cannot be claimed for the use of the partnership or for indemnifying against the liabilities of the firm by the other partner. A creditor of the firm can recover his debt from the property of the partnership as such and from the separate person and property of each partner. Still he is a creditor of the partnership and not that of the partners. Similarly a partner may contract debts on his account making himself and his property liable for the same. Such a creditor may recover his debt from the person, or separate property of the debtor or from the debtor's share in the partnership property. Still he will be called a creditor of the partner and not a creditor of the partnership. Thus there is a real distinction between the partnership property owned by the partners jointly and the separate property of each partner; and between partnership debts and debts of each separate partner.

We have seen that a firm can be adjudicated insolvent in the firm's name. *Vide* section 7. Where there is a joint adjudication, the whole of the property of the bankrupts, whether partnership or separate property, vests in the trustee, and is administered by him. The adjudication of the firm

(1) Order, 6th March, 1794, 1 Mont. and Ayr, 454.

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(4).

means that all the members of the firm are adjudged bankrupts. In the insolvency of the firm the court has to administer the firm or joint estate by distributing it amongst the joint creditors (creditors of the firm) and the separate property of each individual partner by distributing it amongst the separate creditors of each one of them. At the same time, as explained above, the joint creditors had a right, had there been no bankruptcy, to proceed against the separate property of each partner as well. Similarly every separate creditor had a right to proceed against his debtor partner's share in the partnership property. That means that ultimately the partnership property is liable for payment of separate debts of the partners till they are paid in full and, conversely, the separate property of the partners is liable for the payment of partnership debts till they are paid in full. Where only one partner of a firm becomes bankrupt and the others remain solvent, what vests in the trustee is the separate property of the insolvent and his share in the partnership property. But his share in the partnership property shall be in the first instance available for payment of the partnership debts. The partnership creditors will not be allowed to prove against the separate estates and share equally with the separate creditors. They shall be entitled to proceed only against any surplus which may be left after paying in full the separate creditors.

Analysing the sub-section, therefore, we find that it lays down four rules :—

(i) the partnership property shall be applicable in the first instance in the payment of partnership debts ;

(ii) the separate property of each partner shall be applicable in the first instance in payment of his separate debts ;

(iii) the surplus of the separate property of the partners left after the payment of the separate debts in full shall be carried over to the partnership property account and distributed amongst the joint creditors as such ; and

(iv) if there is a surplus left of the partnership property after paying off the partnership creditors it shall be divided in proportion to the rights and interests of each partner in the partnership property and the portions so made shall be carried to the account of each one of them and treated as their separate property.

By way of explanation it may be added that the separate estate of one partner is to be considered as one estate. Thus if there are three partners in an insolvent firm, there shall be four estates to be administered, i. e., one joint estate and three separate estates. The joint estate and the separate estates of the partners are to be considered distinct estates for the purposes of administration. They are so much considered as distinct estates that a joint creditor having a security upon a separate estate of one of the partners is entitled to prove against the joint estate for the full amount of his debt, without giving up his security and *vice versa* (1). If a creditor of a firm and also of an individual partner holds security from that partner for both the joint and separate debts, and the realised separate security is more than sufficient to satisfy the separate debt, such creditor may prove against the joint estate for

(1) *Exp. Peacock*, 2 Gl. & J. 27 ; *Exp. Bowden*, 1 D. & C. 135 ; *Bank of Australasia v. Flower & Co.*, 19 Ch. D. 105 ; *Re Dutton, Massey & Co.*, 1924, 2 Ch. 199.

- S. 61** the full amount of the joint debt, without deducting the security. The
(4). reason is that the security is not on the partnership property (1). And in such a case, *i. e.*, where a creditor of the joint estate, and also of one of the separate estates, holds as security for both of the debts property belonging to the separate estate of the partner who is separately indebted, he may proceed to apportion the security in whatever way is most to his advantage (2).

Joint estate for joint creditors.—The first rule in the distribution of property in the case of insolvent partners is that the partnership property shall be applicable in the first instance in payment of the partnership debts. The rule has been already explained and there are no exceptions to it.

Separate estates for separate debts.—The second rule is that the separate estate of each partner should in the first instance be applied to the payment of his separate debts. In English law the above rule is subject to several exceptions which have been engrafted on it by long usage and judicial decisions. The rules as to the distribution of joint and separate estates are founded upon the equities of the partners *inter se* and the exceptions—at any rate most of them—have originated in the necessity for adjusting equities between the partners. The equitable basis of the rule will be clear from the fact that it is not confined to cases of partnership only but applies to joint contractors generally (3).

We now proceed to consider the exceptions :—

Exception No. 1.—Partnership creditors may prove against and receive dividends out of each of the separate estates, provided there is no joint estate and no solvent partner who can be sued. The reason for the exception is clear. So long as the joint creditors have other properties available for the realisation of their debts, they should not be in justice allowed to compete with creditors who can only proceed against the separate property of the partners. The existence of any joint estate whatsoever, no matter how little it may be, defeats this right of the joint creditors (4). If there is any doubt as to whether there is any joint estate, an inquiry will be directed (5). If, however, the joint estate is pledged for its full value, it shall be considered for the purposes of this section that there is no joint estate (6). If, upon the assumption that there is no joint estate, joint creditors prove against and receive dividends out of one or more of the separate estates, and joint estate is subsequently discovered, the estates so burdened are entitled to re-imbursement out of the proceeds of this joint estate (7).

If there is a solvent partner who can be sued, the exception does not apply. The existence, however, of a solvent partner, if he be abroad (8), or the fact that the estate of a deceased partner is

(1) *Exp. Watson*, 42 L. R. 516.

(2) *Exp. Dickin*, L. R. 20 Eq. 767.

(3) *Re Rogers*, 3 M. D. & D. 95, approved in *Hoare v. The Oriental Bank Corporation*, (1877) 2 A. C. 589 at pages 598, 599.

(4) *Exp. Taith*, 16 Ves. 193.

(5) *Exp. Birley*, 1 M. D. & D. 387; 2 M. D. & D. 354.

(6) *Exp. Geller*, 2 Madd. 262.

(7) *Exp. Willock*, 2 Rose 392.

(8) *Exp. Pinkerton*, 6 Ves. 814.

solvent (1), will not prevent joint creditors from availing themselves of this exception, because under those circumstances there would be no solvent partner whom they could sue. A partner will be deemed to be solvent, although he be in fact insolvent, until his insolvency has been judicially declared (2). If the insolvency is admitted, judicial declaration is not always necessary (3).

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Exception No. 2.—Where a joint creditor is the petitioning creditor under a separate adjudication, he may prove against and receive dividends out of the separate estate *pari passu* with the separate creditors (4), and thus although there is due to him a separate debt, sufficient to have supported the petition (5), and although as to part of the dividends, he will only be a trustee for another joint creditor (6). It is difficult to conceive how one joint creditor could be in a different situation from all the other joint creditors (7). The rule is very singular (8), but the practice is so settled by a long course of decisions that it cannot be upset.

Exception No. 3.—Joint creditors may, by paying the separate creditors in full, acquire the right to prove against and receive dividends out of that separate estate (9). By paying the separate creditors in full the equity of the rule is satisfied. An undertaking to pay the separate creditors is not sufficient, at any rate unless they are ascertained (10). The petitioning creditor, although he may be in fact a joint creditor, is for this purpose deemed to be a separate creditor and must be paid in full (11).

Exception No. 4.—Where a partner has fraudulently converted to his own use property belonging to the firm, the joint estate, if all the partners be bankrupt (12), or the solvent partners, if any (13), may prove against the estate of the bankrupt partner in competition with his separate creditors in respect of the property so fraudulently converted (14).

Applicability of the exceptions in India.—The applicability of the exceptions has been considered in one Indian reported case (15). The particular exception considered in that case was exception no. 2, *i. e.*, in favour of the petitioning creditor, and it was held that that exception

(1) *Exp. Banerman*, 3 De l. 476.

(2) *Exp. Janson*, 3 Madd. 229.

(3) *Re Carpenter* 7 Mor. 270.

(4) *Exp. Ackermann*, 14 Ves. 604.

(5) *Exp. Barnett*, 2 M. D. & D. 357.

(6) *Exp. De Tastet*, 17 Ves. 247.

(7) *Exp. Hall*, 1804, 9 Ves. 349, per Lord Chancellor Eldon.

(8) *Exp. Ackermann*, 1868, 14 Ves. 604.

(9) *Exp. Chandler*, 9 Ves. 35.

(10) *Exp. Taith*, 16 Ves. 193.

(11) *Exp. Chandler*, 9 Ves. 35.

(12) *Exp. Lodge*, 1 Ves. 166.

(13) *Exp. Yonge*, 2 Rose, 40.

(14) *Lacey v. Hill*, 1876, 4 Ch. D. 536, affirmed *Subnom. Read v. Bailey*, 3 A. C. 94.

(15) *Narain Das Dorilal v. Mihilal*, A. I. R. 1934 All. 521 : 149 I. C. 935 : 56 All. 1041.

S. 61 does not apply in India. The grounds of the decision were stated as follows :—

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"The Provincial Insolvency Act is an Act to consolidate and amend the law relating to insolvency in British India, and it must be presumed that the Indian legislature in passing this Act was aware of the exceptions made by the courts in England to the English Bankruptcy Act, on which the Indian enactment is based. If it was the intention of the legislature to allow exceptions to the rule as laid down in the Act, we should expect to find provisions to this effect in the Act itself. It would, in our opinion, be contrary to the intention of the legislature to introduce exceptions to the clear terms of the Act. No single case decided by any court in India has been brought to our notice in which effect has been given to such exceptions to the law as laid down in the Act."

It is submitted that, despite the Act being a consolidating and amending one, it is incomplete in many respects and that those gaps have been filled up by the Indian courts by reference to the English Acts. Again the English Act also contains exceptions of the nature specified in the first sub-section of section 61. Notwithstanding those exceptions in the English Act, that Act has not been so interpreted as to exclude the applicability of the above mentioned exceptions in the distribution of joint and separate estates. The legislature at the time of enacting the present Act was also aware of the fact that the English section, though arranged and worded similar to section 61, was still so interpreted as to admit of the applicability of these exceptions. That knowledge might have induced the legislature to leave the matter as we find it now without entering into the difficult task of codifying the English law in all respects. On examining the Provincial Insolvency Act, if there is one thing which impresses more than anything else, it is this that the framers of the Act were anxious to make it as short as possible. The preamble of the Act, therefore, cannot by itself be taken as an evidence of the legislature's intention that it wanted the Indian courts to exclude the exceptions well established under the English law in interpreting the Indian Act.

Payment in full of joint and separate debts.—In order that the rule stated in the sub-section may be applied the debts of one estate must be paid in full in the first instance and only the surplus is to be utilised for the payment of debts due from the other estate. "In bankruptcy there is only one administration of joint and separate estates, though for convenience of administration the creditors are divided into two classes. And the rule is clear that when a creditor is competing with the other creditors, he cannot prove for interest accrued due after the adjudication. Of course, if he has a security for his debt, the case is different. But, in the absence of any security, a creditor cannot get interest on his debt accrued subsequently to the adjudication until the creditors, joint and separate, have been satisfied the principal of their debts" (1). Payment in full did not, under former statutes, for this purpose, include payment of interest (2). The present sub-section (5) is also the same. Interest after the order of adjudication is not to be paid till all the debts, mentioned in the section (including the debts due both from the joint and the separate estates) are paid.

(1) *Exp. Findlay*, 17 Ch. D. 334, per James, L. J.

(2) *Exp. Clarke*, 4 Ves, 657.

What estate is joint and what is separate.—There is only one administration in bankruptcy of the estate of the partnership as well as of the separate estates. But in order to give effect to the rule embodied in subsection (4), the receiver has to treat the property belonging to the joint and separate estates and their creditors distinctly and has to keep separate record and account in the distribution of property. For that purpose he has to distinguish separate property from joint property and separate debts from joint debts. It is a question of fact whether the property is joint or separate estate. The conduct of the bankrupts leading a creditor to believe joint to be separate estate will not entitle him to treat it as such for the purpose of proof (1). The general rule on which the distinction between joint estate and separate estate is based depends upon the equities of the partners *inter se*, and not upon any lien of the creditors upon them. For the purposes of distribution, therefore, whatever is as between the parties themselves joint estate, and whatever is as between them separate estate, will be joint or separate estate. This is subject, however, to the doctrine of reputed ownership. Like any other property the character of the estate may be altered by the partners by *bona fide* transfers, that is to say, the partners may by a valid agreement treat the joint property as separate or separate property as joint amongst themselves (2). And this may be even though at the time of such alteration the estate of which the property is transferred is insolvent (3). The agreement to transfer, however, must not be executory (4), which means not "that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative (5)." Again the agreement or transfer must be a *bona fide* one and should not be tainted with fraud (6). The general test to see as to whether a particular property has ceased to be joint property is that the transfer must be such as to get rid of any rights in the transferring partner to have the transferred assets applied in indemnifying him against the liabilities of the firm. For instances where such transfers were considered see the undermentioned cases (7). In each case the question is primarily one of construction of the partnership deed or the subsequent agreement, if any (8). In the absence of any agreement to the contrary, that only will be joint property which was existing as such at the date of the dissolution (9).

The second circumstance which affects joint or separate estates is the doctrine of reputed ownership. As stated before, the rule as to the distribution of joint and separate estates is founded upon the equities of the partners *inter se*. This rule is, however, subject to the above doctrine which has its origin in an equity in favour of the creditors. Thus the separate property in the reputed ownership of the firm will be dealt with as part of the joint estate, and joint property of the firm in the reputed

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- (1) *Exp. Connell*, 3 Dea. 201; *Re Collie*, 3 Ch. D. 481.
 - (2) *Exp. Ruffin*, 6 Ves 119; *Exp. William*, 11 Ves 3.
 - (3) *Exp. Walker*, 4 DeG. F. & J. 509; *Exp. Peake*, 1 Madd. 346.
 - (4) *Exp. Kempner*, L. R. 8 Eq. 286; *Exp. Wheeler*, 1817, Buck, 25.
 - (5) *Pearce v. Bulteel*, (1916) 2 Ch 544, per Neville, J. at p. 566.
 - (6) *Exp. Rowlandson*, 2 V. and B. 172; *Anderson v. Maltby*, 2 Ves 244.
 - (7) *Exp. Morley, re White*, L. R. 8 Ch. 1026; *Exp. Dear*, 1 Ch. D. 514; *Exp. Manchester Bank*, 12 Ch. D. 917, affirmed sub-nom, *Exp. Butcher*, 13 Ch. D. 465; *Re Simpson*, L. R. 9 Ch. 572; *Exp. Wood*, 10 Ch. D. 554; *Re Jane*, 110 L. T. 556.
 - (8) *Re Head*, 10 Mor 76; *Re Daniel*, 3 Mans 312.
 - (9) *Exp. Morley*, L. R. 8 Ch. 1026; *Payne v. Hornby*, 25 Beav. 280.

§ 61 ownership of one partner will be dealt with as part of the separate estate.
 41. The doctrine comes to be applied generally either where there have been changes in the constitution of the firm by the retirement of a partner, or the admission of a new partner or the death of a partner, etc., or where there is no joint estate in fact but only by repute. When a partner retires or a new partner is admitted, the change does not necessarily cause a change in the reputed ownership of the property of the old firm. Very often property left in the reputed ownership of the old firm, although in fact belonging to the new firm, has, in the event of bankruptcy, been treated as part of the joint estate of the old firm (1). Similarly if a partnership is dissolved and one of the partners continues to carry on the business on his own account by the tacit consent or acquiescence of the retired partners, the joint estate of all will be distributable as a separate estate of the continuing partner (2). The same will be done where partnership property comes in to the hands of one partner by survivorship, and that partner becomes bankrupt (3).

There may not be any joint estate in fact; a representation that there is a partnership is sufficient to create joint estate (4). It is created by reputed ownership (5). See also commentary under section 28 (3).

What debts are joint and what are separate—Just as the assets of the joint and separate estates are to be kept distinct so are their liabilities. The question whether the debt is a joint or a separate one depends upon the terms of the contract or the agreement between the parties. It is the nature of the debt at the date of bankruptcy which determines against which estate the proof is to be made. The nature of a debt is not changed merely because the joint or one of the separate estates, as the case may be, has had the whole benefit of that for which it was incurred (6). To fix the estate which is sought to be charged, it is necessary to show that it had agreed to accept the liability, and the creditor had acquiesced. Joint debts may be converted into separate and separate into joint debts in a number of ways, *i.e.*, novation, merger, discharge, etc. The mere fact that a partner is also personally liable for the partnership debt will not deprive it of its character as a partnership debt (7). The reader is referred to the Indian Contract Act and other books dealing with the general law of contracts and debts. Sometimes it happens that a debt is due from a firm as well as a partner or partners separately in their individual capacity. In such cases the question arises as to against which estate is the creditor entitled to prove. We proceed to consider the subject under the next heading.

Bankruptcy : doctrine of election—Prior to the Bankruptcy Act of 1914, the matter in England was governed by what is generally known the bankruptcy doctrine of election. It is that the creditor is not entitled to prove against, and receive dividends from both the estates of the firm and

(1) *Exp. Burton*, 1 Gl. & J. 207; *Exp. Sprague*, 4 DeG. M. & G. 866; *Exp. Harris*, 1 Madd. 583.

(2) *Horn v. Baker*, 9 East 215; *West v. Skip*, 1 Ves. sen. 239; *Exp. Barrow*, 2 Rosc. 252.

(3) *Exp. Leaf*, 1 M. & C. 662; *Exp. Heath*, 4 Jur. 8.

(4) *Exp. Arbouin*, 1846 DeG. 359.

(5) *Re Rowland and Crankshaw*, L. R. 1 Ch. 421; *Exp. Hayman*, 8 Ch. D. 11; *Exp. Sheen*, 6 Ch. D. 235.

(6) *Exp. Peele*, 6 Ves. 602; *Exp. Bolitho*, 1817, Buck, 100; *Emly v. Lye*, 15 East, 7.

(7) *Hans Raj v. Ramditta Mal*, 143 I. C. 755 (2); A. I. R. 1933 Lah. 639.

the separate estate of the partner. He will have to elect whether he would prove against the joint estate or against the separate estate. The election is, however, to be made by him; he cannot be compelled to prove against one estate and not the other (1). The liability of the joint estate and the separate estate should be distinct, though it may be contained in one instrument. Thus there may be a promissory note made by the members of the firm jointly, and also by some or all of them separately (2); or it may be a decree obtained against the partnership property and also against one of the partners personally (3).

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The mere effect of a creditor proving against one estate will not necessarily preclude him from proving against the other, even if he has received a dividend from the former. Thus it has been held that a creditor who had proved and received a dividend might change his election on refunding the dividend received with interest at four per cent., though he could not disturb any dividend already paid (4). He will not, however, be permitted to alter his determination after he has made a deliberate and conclusive election (5). Where a creditor proved and received a first and final dividend in a bankruptcy in Hongkong on the footing that the debt was for the price of goods sold and delivered and at the same time continued an action against the bankrupt and his trustees for the return of the goods on the ground that they had been obtained by fraud, it was held by the Privy Council that, notwithstanding the express reservation by the creditor of the rights asserted in the action, the proof and receipt of dividend constituted an irrevocable election to appropriate the contract, and that therefore the action had been properly dismissed (6).

Schedule 2, rule 19, B. A., 1914, now contains an express provision for proof in respect of distinct contracts. It runs as follows:—

"If a debtor was, at the date of the receiving order, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint-contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts."

The rule abolishes the bankruptcy doctrine of election in the case of contracts; for although its application is limited by the express words of the rule to cases where the joint liability is a liability as members of a firm, this will include all cases in which the doctrine of election could have applied, because that doctrine could only have applied where there was a joint estate, and, whenever there is a joint estate there is a firm (7). The rule is, however, confined to the case of contracts only. It does not apply

(1) *Jethalal-Chhotalal v. Lallubhai-Mulchand*, A. I. R. 1930 Bom. 380; 127 I. C. 335.

(2) *Exp. Honey*, L. R. 7 Ch. 178.

(3) *Jethalal-Chhotalal v. Lallubhai-Mulchand*, A. I. R. 1930 Bom. 380; 127 I. C. 335.

(4) *Exp. Adamson*, 8 Ch. D. 807.

(5) *Exp. Dixon*, 2 M. D. & D. 312. *Exp. P. Husbands*, 2 Gl. & J. 4; *Exp. Bolton*, 1816, Buck, 7; *Exp. Law*, M. & Ch. 111; *Exp. Liddel*, 2 Rose, 31.

(6) *The Kin Yee Loong v. Seth*, 1920, B. & C. R. 89.

(7) *Exp. Honey*, L. R. 7 Ch. 178, per Mellish, L. J.

- S. 61 to breaches of trust of a firm and frauds imputable to a firm. In the
(4). absence of any provision similar to rule 19, second Schedule, B. A., 1914,
it is submitted that the old doctrine of election will apply in India.

Exception to the above rule.—Where trust money has been misappropriated by a firm, one of the partners in which is a trustee, proof may be made against the separate estate of the trustee partner as well as the joint estate (1). The same principle applies in every case where there is a fiduciary relation resting on contract such as that of a promoter or agent or director, and it makes no difference that the trust fund properly comes into the possession of the firm in the first instance or that the trustee member had not originally possession of it (2). The ground of the above exception to the general rule that a liability arising out of a breach of contract cannot be proved against both the estates is that here the several liabilities arise out of distinct contracts. The exception will not apply to the case of misapplication of a trust fund by a firm, no member of which is an express trustee (3).

Insolvency of one partner.—So far we have considered the case where the joint estate is insolvent. Where the firm itself is solvent and only one partner becomes insolvent, the separate property of the insolvent partner as well as his share in the partnership property vests in the receiver. The share of the partner in the partnership can, however, not be made available for the payment of the separate debts of the insolvent partner until the partnership debts are paid off. In the words of Lord Tenterden, it is clearly established as a good principle of law that if one partner becomes a bankrupt his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership (4). In England the insolvency of a partner constitutes a dissolution of the partnership (5), subject to any agreement between the partners (6). The trustee becomes a tenant in-common with the other partner, subject to an account, and the trustee is in strictness entitled to put a person in possession of the whole of the property of the firm. Even if the strict law is such, the actual practice there is that the administration of the partnership affairs for the purpose of ascertaining and paying to the trustees the bankrupt's share in the assets will be carried out, as a rule, by the solvent partner, unless there be any misconduct on his part or he be abroad or dead (7). The solvent partners are however liable to furnish the trustee with proper accounts, and they must allow him to inspect the partnership books (8). Section 117 and section 111, B. A., 1914, contain provisions relating to the rights of solvent partners and the trustee of the insolvent partner in the matter of bringing suits.

Sections 117 and 118 run as follows :—

"Section 117.—Where a member of a partnership is adjudged bankrupt, the court may authorise the trustee to commence and prosecute

(1) *Re Parkers* 19 Q. B. D. 84; *Re Lake*, 1903, 1 K. B. 439.

(2) *Re P. Macfadyen & Co.*, 1908, 2 K. B. 817.

(3) *Re Kent, County Gaslight & Cooke Co., Ltd.*, 1913, 1 Ch. 92.

(4) *Holderness v. Shackles*, 1828, 8 B. & C. 612.

(5) *Fox v. Hanbury*, 1776, Cowp 445; *Edwards v. Hooper*, 11 M. & W. 365.

(6) English Partnership Act, 1890, Sec. 33.

(7) *Exp. Gordon*, L. R. 8 Ch. 555; *Exp. Owen* 13 Q. B. D. 113; *Hankey v. Garret*, 1 Ves. 236; *Barker v. Goodair*, 11 Ves. 78.

(8) *Exp. Stoveld*, 1 Cl. & J. 308.

any action in the names of the trustee and of the bankrupt's partner ; and any release by such partner of the debt or demand to which the action relates shall be void ; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.

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Section 118.—Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt ”.

In India, prior to the Indian Partnership Act, Act 9 of 1932, the insolvency of a partner did not *ipso facto* operate as a dissolution of the partnership (1). The solvent partners could however seek dissolution through the court in a regular suit under section 254 of the Indian Contract Act, 1882. The law under the Indian Partnership Act is the same as it is in England. By section 42 of the Act the adjudication of a partner as an insolvent dissolves the partnership, subject, of course, to a contract to the contrary. The position of the receiver of an insolvent partner in relation to the partnership is now the same in England and India.

In England, the practice is that the solvent partner is allowed to make arrangements for securing to the trustee payment of the bankrupt's share in the assets of the firm. There the dissolution of the partnership firm, in the case of a partner being separately adjudicated bankrupt, dates from the act of bankruptcy, the authority of the bankrupt to deal with partnership assets is determined from that date, and the accounts between the trustee of a bankrupt partner and the solvent partner are made up from the same date except as to profits made by the solvent partner subsequent to the bankruptcy by employment of the capital existing at the date of the bankruptcy, of which the trustee is entitled to account (2). The same rule will apply in India, except that for the act of bankruptcy it shall be the presentation of the petition which shall be the material date.

Proof by a partner against the joint estate.—It may be and often happens that the firm is indebted to one of the partners as well, in addition to other creditors. In the insolvency of the firm the partner creditor does not stand on the same footing as the other creditors of the firm. He cannot be allowed to prove against the joint estate, the reason being that it will bring him in competition with his own creditors. The other creditors of the firm are entitled to get their debts paid from the insolvent partner as well, and in justice to the other creditors, the insolvent partner creditor cannot take away any portion of the partnership debt without first paying off the joint creditors. This rule is, however, subject to certain exceptions. They are, firstly, that where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership by the partnership, the partner so defrauded, or, if he be bankrupt, his separate estate, may prove

(1) See also *Ma Thwe v. Munshi Ram*, 131 I. C. 62 : A. I. R. 1931 Rang. 191 ; *Sanyasi Charan Mandal v. Ashutosh Ghosh*, A. I. R. 1915 Cal. 482.

(2) *Crawshaw v. Collins*, 15 Ves 218 and Sec. 42 of the English Partnership Act, 1890.

- S. 61** against the joint estate, in competition with the joint creditors (1).
(4.) The converse is also true and we have already considered it as a case when joint creditors may prove against a separate estate. Secondly, where one or more members of a firm carry on a distinct and separate trade either the aggregate firm (firm within the firm) or the member or members of it, who carry on the separate trade, may prove against the other (major firm) for debts which have arisen in the ordinary course of business, but for such debts only (2). There can be proof for goods supplied but not for money (3), unless, in the case of bankers, whose business may be said to be dealing in money (4).

The important point to note in the application of the exception is that the smaller firm must be, in fact, carrying on a distinct trade, and not be merely a branch of the larger firm, carrying on its business. That is to say, there should in fact be two distinct estates. The fact that a person carries on two businesses in different names, one in India and one abroad, and that separate proceedings in bankruptcy are taken out in each country for the distribution of the property there situate, does not make the bankrupt a member of two distinct firms, since there is really one estate (5).

Proof by one partner against another partner—In the preceding para we have considered as to when a partner creditor can prove against the joint estate in the insolvency of a firm of which he is a member. We now consider proof by a partner or by his estate, if he be insolvent, against the separate estate of a bankrupt co-partner. Here too the test is the same, *i. e.*, the partner will not be allowed to prove against his co-partner, if by doing so he comes into competition with his own creditors. The rule is that so long as there are any joint debts, and any possibility of their being brought upon the separate estate, a partner, or his estate, who is liable for such joint debts, may not make any claim against the separate estate, if he, or it, may possibly come into competition with his, or its, own creditors (6). The rule does not apply unless there has been actually proved in the bankruptcy some debt for which the bankrupt and the person seeking to prove were jointly liable, and the possibility of such debts being proved is not enough (7). The existence of debts which, though provable against the estates of the insolvent partners are against the partner seeking to prove statute-barred, will not preclude the latter from proving (8). The reason is that the joint creditors having allowed their remedy against the partner seeking to prove to become barred by time cannot come into competition with him. If there were never any joint debts, or if all those

(1) *Exp. Sillitoe*, 1824, 1 Gl. & J. 374, 382, per Lord Eldon.

(2) *Exp. Sillitoe*, 1824, 1 Gl. & J. 374; *Exp. Castell*, 2 Gl. & J. 124; *Exp. Maude*, L. R. 2 Ch. 550.

(3) *Exp. Thompson*, 3 D. & C. 612.

(4) *Exp. Williams*, 3 M. D. & D. 433.

(5) *Exp. Wilson*, L. R. 7 Ch. 490; *Exp. Banco De Portugal*, 11 Ch. D. 317, affirmed sub nom *Banco De Portugal v. Waddell*, 5 App. Cases. 161; *Mangat Rai v. Mohan Lal*, A. L. R. 1934 Lah. 33; 149 I. C. 935; *Yokohama Specie Bank v. S. Curlender & Co.*, 1926, 43 C. L. J. 436; 96 I. C. 459; A. I. R. 1926 Cal. 898.

(6) *Exp. Ellis*, 2 Gl. & J. 312; *Exp. Carter*, 2 Gl. & J. 233 *Exp. Gordon*, L. R. 10 Ch. 160, affirmed on appeal, sub nom *Nanson v. Gordon*, 1 App. Cases, 195; *Exp. Blythe*, 16 Ch. D. 620; *Re Hind*, 62 L. T. 327.

(7) *Exp. Andrews*, 25 Ch. D. 605; *Exp. Carter*, 2 Gl. & J. 233. See also *Re Joseph & Bergel's Deed*, 100 L. T. 74.

(8) *Re Hepburn*, 14 Q. B. D. 394.

which once existed have been paid in full, the rule will not apply (1). An undertaking, however, by the creditor partner to indemnify the joint estate (2), or evidence that the joint estate is sufficient to pay the joint creditors in full is not enough, nor will an inquiry be directed to ascertain whether this be so (3).

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(4)

As already stated, the reason of the rule is to prevent competition between the creditor partner and his own creditors as the joint creditors can recover the balance left unpaid by the joint estate from the separate estate of the creditor partner. Where, therefore, the separate estate of the debtor partner is insufficient for the payment of separate debts, exclusive of the debt to his co partner, and consequently there can be no surplus for the joint creditors, the rule has no application, and the creditor partner may prove against the separate estate of the debtor partner in competition with the latter's separate creditors (4). This exception was introduced by Lord Westbury in the case last cited. The exception applies even where the trustee of a solvent separate estate seeks to prove in an insolvent separate estate. The applicability of the exception to such a case was formerly doubted (5), but now it is settled that it applies (6). The executor of a deceased partner is generally in no better position than the deceased would have been (7). The earlier law was somewhat different (8).

The rule that a partner cannot prove in the insolvency of another partner will not apply where the share of the deceased partner has been ascertained before the adjudication and no joint liability can be shown to exist. Thus where on the death of a partner in a London firm a sum was found due to his estate from the surviving partners and disputes between the deceased partner and another firm in Dundee, of which he was also a member and which after his death was a creditor of the London firm, were compromised and settled by the executors, it was held that a proof by the executors in a subsequent bankruptcy of the London firm ought to be admitted (9).

Application of surplus.—Where there is a surplus of the separate property of the partners, it is to be dealt with as part of the partnership property and the surplus of the partnership property is to be dealt with as part of the respective estates in proportion to the rights of the partners therein. The rule is sufficiently clear and does not need much explanation. Where a man is partner in several firms, and all of them become bank-

(1) *Exp. Dodgson*, 1823, Mont & McA. 445; *Exp. Davis*, 4 DeG. J. & S. 523; *Exp. Watson*, 4 Madd. 477.

(2) *Exp. Moore*, 2 Gl. & J. 166.

(3) *Exp. Bass*, 36 L. J. Bank. 39.

(4) *Exp. Topping*, 34 L. J. Bank. 13.

(5) *Lacey v. Hill*, L. R. 8 Ch. 441.

(6) *Re Head*, 1894, 1 Q. B. 632.

(7) *Exp. Carter*, 2 Gl. & J. 233; *Nanson v. Gordon*, 1 App. Cases 195; *Exp. Blythe*, 16 Ch. D. 620, (in this case the administrator of the deceased partner was not allowed to prove in competition with his creditors for his share of the partnership capital in the liquidation of the surviving partners, even though they had improperly continued to employ that share in the business after the death of the intestate).

(8) See *Exp. Garland*, 10 Ves. 110; *Exp. Butterfield*, De Gex. 570; *Exp. Westcott*, L. R. 9 Ch. 626.

(9) *Re Douglas*, 1930, 1 Ch. 342.

S. 61 rupt, the surplus of his separate estate will be distributed amongst the
(5) several joint estates in proportion to their liabilities (1).

Consolidation of estates.—Neither in the English Act nor in the Indian Acts is there any provision as to the consolidation of joint and separate estates. The old law which, it seems, still exists, has been thus stated: "Where the joint and separate estates are so blended together as to render it impracticable to keep them separate the court will consolidate them, but not where the accounts can be kept distinct and a single creditor objects (2). Even if the creditors at a general meeting agree to consolidate the estates, the court will not sanction the measure without inquiry whether the proposed consolidation will be for the benefit of the creditors generally" (3). An order for consolidation will not be made merely because difficulties are likely to arise in distribution, with regard to the investigation of proofs or as to whether creditors were originally joint or separate, and whether or not in certain cases there has been a novation, even though they may add to the expense of the administration (4).

Sub-section (5).—Subject to the provisions of this Act, all the debts entered in the schedule are to be paid *pari passu*. Under the old law of England debts on voluntary bonds or covenants were postponed in bankruptcy to other debts. The present law is, both in England and in India, that all debts except those to which the statute expressly gives priority or those postponed under the statute, are entitled to receive dividends *pari passu* (5). The court has no power to make a distribution among a limited class of creditors only (6). Under the Act 3 of 1907, an order of discharge released the insolvent only from those debts which were entered in the schedule and not from all those which were provable in bankruptcy. In a case under that Act, a creditor held two decrees but in the insolvency proceedings he proved only one decree, reserving the other to settlement after the discharge of the debtor; and the court, recognising the inequity of the tactics, excluded the decree that had been proved from the benefit of the conditions imposed on the discharge of the insolvent under S. 44 (2) (c) P. I. A., 1907, that is to say, excluded him from receiving dividends. It was held that, in view of the provisions for equal division of assets contained in Ss. 33 and 39, P. I. A., 1907, the order of exclusion was incompetent (7). Just as the court cannot exclude a creditor from sharing in the dividends, it cannot also give priority to the debts of certain creditors, apart from the provisions of the Act. Thus it has been held that the creditors of the ancestor are not entitled to any preference in the insolvency of the legal representative. Not only that, but until there is a personal decree under S. 52, C.P.C., against a person as the legal representative of another, the liability is not provable in the insolvency of such legal representative (8). Where a promisee in a contract of indemnity becomes bankrupt

(1) *Exp. Franklyn, re James*, (1819) 1 Buck. 332.

(2) *Exp. Sheppard*, M. & B. 415.

(3) Archbold's Bankruptcy, page 392, cited in William's Bankruptcy Practice, 14th edition on page 208, *Exp. Strutt*, 1 Gl. & J. 29.

(4) *Re Kriegel*, 10 Mor. 99, followed in *Re Barker & Co.*, 21 Mans 238.

(5) *Exp. Pottinger*, 8 Ch. D. 621, decided upon like words in section 32 of the Act of 1869; *Re Coates*, 2 Mor. 87, decided under the Act of 1883.

(6) *Re Wiskemann*, 1923, B. & C. R. 28.

(7) *Desh Man v. Tailor*, 19 I. C. 385; 6 S. L. R. 163.

(8) *P. A. A. Chettyar Firm v. P. R. N. Chettyar Firm*, A.I.R. 1934 Rang. 162; 152 I. C. 558.

the trustee in bankruptcy can recover the amount from the promisor but the sum so recovered must first be applied to discharge the claim agreed to be indemnified. Thus to take an illustration, B has a claim upon A, but, in respect of that claim, A has a right to be indemnified by C. A goes bankrupt. A's trustee in bankruptcy can force C to pay the amount of the claim to him but the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified (1). Under the common law of England an indemnity was confined to protecting the indemnified against actual loss and not against liabilities (2). But the courts of equity in England have not followed the common law in this respect and have acted on the rule of equity that the indemnity should extend even to liability and not actual loss only (3).

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(6);
S. 62.

In England certain debts are postponed under the Partnership Act, 1890, sections 36 and 42, B. A. of 1914, and Bovill's Act (28 and 29 Vict. c. 86). In the Indian Acts there are no provisions postponing the payment of certain debts to others in the distribution of property in an insolvency.

Sub-section (6).—The question of payment of interest has been considered at length under section 48 of the Act. Refer to commentary under that section.

Miscellaneous.—At the time of making an order of adjudication against the partners of a firm, the court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estates of the partners; and the order of adjudication is not irregular for that reason (4). The directions are to be certainly given by the insolvency court; and such directions may be given even after the discharge of the insolvent, if necessary (7).

62. (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

(a) debts provable under this Act and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;

(b) debts provable under this Act, the subject of claims not yet determined;

(1) *Osman Jamal v. Gopal Purshottam*, A. I. R. 1929 Cal. 208 : 56 Cal. 262 : 118 I. C. 882.

(2) *In re Perkins*, 1898, 2 Ch. 182

(3) See A. I. R. 1929 Cal. 208 *supra* for a discussion of the English case-law.

(4) *Dabendra Chandra Sikdar v. Purushotam Dass*, 55 I. C. 186 : A. I. R. 1920 Cal. 189.

(5) *K. P. S. P. L. firm v. C. A. P. C. Firm*, 117 I. C. 582 : 7 Rang. 126 : A. I. R. 1929 Rang. 168.

(6) *Dehendra Chandra v. Purushotam Dass*, 55 I. C. 186 : A. I. R. 1920 Cal. 189.

(7) *K. P. S. P. L. Firm v. C. A. P. C. Firm*, 117 I. C. 582 : 7 Rang. 126 : A. I. R. 1929 Rang. 168.

- S 63. (c) disputed proofs or claims ; and
 (d) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends.

History.—This is section 39, sub-sections (1) and (2) of the Act 3 of 1907. Section 39 of the old Act had five sub-sections. The first two are now reproduced in section 62 and the remaining three sub-sections are now reproduced in the Act as sections 63, 64 and 65.

Analogous law.—The corresponding sections of the Presidency-towns Insolvency Act, B. A. of 1883 and B. A. of 1914, are 71, 60 and 64 respectively.

Sub-section (1)—The section makes provision for the payment of creditors who reside in places so distant that they have not had sufficient time to tender their proofs, and also for claims not yet determined (1).

The receiver must also make provision for any disputed proofs or claims and for the expenses necessary for the administration of the estate. He, however, need not make any reserve in respect of the amount which may ultimately become provable by a secured creditor who has neither valued nor realised his security (2).

Receiver's non-compliance with the section.—Where the official assignee distributed the assets of the insolvent after deducting commission etc., to the two scheduled creditors, though he had notice of claims by three other creditors and their claim, were neither admitted nor rejected, it was held that the official assignee was personally liable for the amount of which the three creditors had been deprived (3).

63. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

History and analogous law.—This is section 39, sub-section (3) of the Act III of 1907. It corresponds to S. 72, P-t I. A., 1902, S. 61, B.A., 1883 and S. 65, B. A., 1914.

(1) *Krishna Chinnoo v. Maturbhai*, (1929) 53 Bom. 290 : 117 I. C. 440. A. I. R. 1929 Bom. 107.

(2) *Exp. Good*, 14 Ch. D. 82 ; *In re Jannadas Vishandas*, A. I. R. 1935 Sind 67 : 159 I. C. 745.

(3) *Re Archibald Gilchrist Peace*, 25 C. W. N. 658.

Lapse of time no bar to proof.—The section recognises the fact that a creditor may come in and prove his debt at any time, so long as there are assets available for distribution. The leading English case on the subject is *In re McMurdo* (1), where the rule was stated by Romer, L.J., in the following words :—“As a rule no injustice is done when a creditor comes in, for the bankruptcy court can always impose terms which will prevent any unnecessary delay in the administration of the estate in bankruptcy being caused by the lateness of the creditor coming in, and as a rule, subject, as I have said, to care being taken that no injustice is done, by special order the court of bankruptcy will undoubtedly, notwithstanding R. 1., allow a creditor, notwithstanding his delay, to come in and prove and share in undistributed assets. I will not say that there may not be special circumstances that might justify the bankruptcy court in refusing to admit a creditor who came in late ; but I have stated what I conceive to be the general rule and practice of the bankruptcy court.

This rule has been followed both in England and in India (2).

Rights of creditors who come in late.—The section describes the rights of a creditor who comes in to prove his debt after the declaration of a dividend. His one right is that he shall be entitled to be paid out of the money in the hands of the receiver before that money is applied to the payment of any future dividend or dividends. He shall be entitled to the dividend which he would have got if he had proved at the very outset. Where there is more than one creditor who proves after the declaration of dividends and the assets in the hands of the receiver are not sufficient to pay them all, the question that arises for determination is as to whether they shall rank *pari passu* as between themselves or they shall get their respective claims in full in the order of their proving. It has been held by the Sind Court (3) that they should share rateably the excess assets, not exceeding the dividends already declared, and that neither of them should be given an advantage over the other. The grounds of the decision were stated thus :

“As such cases are rare, the legislature appears to have made no express provision for them in the Act. These cases might be conveniently divided into the following two groups :—(1) Creditor A applies for his name being entered in the schedule and it is so entered before any other creditor has made a similar application. (2) Creditor A applies for his name being entered in the schedule and before his name is so entered, creditor B applies for his claim being entered. With regard to (1) it would appear that there will be no objection to A receiving an amount not exceeding the dividend already declared out of the excess assets in the hands of the Official Receiver.

But in the second case different considerations apply. Section 63 enacts an exception to the general rule that the assets of an insolvent should be distributed equally amongst his creditors in so far as it pre-

(1) 1902, 2 Ch. 651.

(2) *Exp. Boddam*, 2 D. F. & J. 625 ; *Ajudhya Nath v. Anant Das*, 3 All. 799 (the right was recognised in a suit) ; *Re Cobbold*, 36 Cal. 512 (proof was allowed in appeal) ; *In re Amalrai Godhumal*, A. I. R. 1933 Sind 370 : 147 I. C. 410.

(3) *In re Amalrai Godhumal*, A. I. R. 1933 Sind 370. 147 I. C. 410 ; *Seth Jampadas-Vishandas v. Firm Naraindas Jethanand*, A. I. R. 1936 Sind 186 : 166 I. C. 273.

S. 63 vents the dividends already declared being disturbed but it goes no further. Singular includes the plural, and the expression "my creditor" in section 63 includes all creditors who are not prevented from disturbing the dividends already declared. But it has nothing in section 63 to suggest that it purports to deal with the equities between creditors who are late.

Equity requires that both of them should have rateably the excess assets not exceeding the dividend already declared and that neither of them should be given an advantage over the other. Both are equally to blame in coming to the court late, and there is no reason why the general rule of dividing rateably the assets of an insolvent amongst his creditors should not prevail. To hold otherwise might lead to anomalous results. It might be that the first in time to apply might not be the first in time to have his claim accepted, and to have his claim included in the schedule. This might be due to a pure accident or due to an act of the court. It hardly stands to reason why in such a case he should suffer" (1).

The contrary view that late creditors should not rank equally between themselves was taken in another case (2). The point is not free from difficulty. The Act is silent and the point falls to be determined by general equitable considerations. There is much force in the reasons adduced in support of the *Sind* view and the section also appears to place all those creditors, who come after the declaration of a dividend but before the other assets are distributed by the declaration of a second dividend, on the same footing.

Late creditors cannot disturb dividends already declared.—It is the general policy of the court not to interfere with the distribution already made in the case where a creditor comes in late (3). This will be true whether the first dividend turns out to be the final dividend. At the time of the declaration of the first dividend it is not possible for the receiver to be sure whether it will or will not be the final dividend. And the mere fact that no individual notices were given under section 64 is not a ground entitling the late creditor to disturb the dividend already declared (4). Where a creditor has lodged his proof but through oversight in the office of the official assignee his name is not included in the list of creditors and no notice of dividend was given to him, the declaration of dividend may be set aside, and the creditors who have received dividends may be ordered to repay the excess of the dividends which have been paid to them over and above the amount which they may be entitled to receive in common with the other creditors (5).

Creditor's right to prove under a composition.—It is provided by section 39 that after the approval of a proposal of composition or scheme, the court shall frame a schedule in accordance with the provisions of section 63. That means that under a composition scheme the creditor may prove his debt after approval of the composition but he shall

(1) *Hiranand Moolchand v. Official Receiver*, 100 I. C. 791.

(2) *In re Amalrai-Godbhumal*, 147 I. C. 410, A. I. R. 1933 Sind 370.

(3) *Vijlal-Mansukhram v. Chunilal*, A. I. R. 1931 Bom. 210: 55 Bom. 200: 131 I. C. 881, *Jamnadass Vishandas and another, in re*, A. I. R. 1935 Sind 57: 159 I. C. 745.

(4) *Vij Lal Mansukh Ram v. Chohan Lal Sarda*.

(5) *Re Ramchandar Ganpat Wanker*, 1927, 29 B. L. R. 1167.

be allowed to do so only on the footing of the terms of the composition. Under the Provincial Insolvency Act, the creditor is not, however, bound to come in insolvency and get his name entered in the schedule of creditors. The composition releases the debtor only from those debts which are entered in the said schedule and not from those which are not so entered. The creditor not so proving may have his remedy dehors the insolvency proceedings. For full notes, including the amendment in 1935, see section 39.

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64. When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

History.—This is section 39 (4) of the Act 3 of 1907.

Analogous law.—The section corresponds to section 73, Pt. 1. A., 1909, section 62, B. A., 1883, and section 67, B. A., 1914. The rules relating to dividends under the Presidency-towns Insolvency and the English Acts are much more comprehensive. Thus it is provided by S. 71, P-t. 1. A., and section 63 (2), B. A., 1914, that where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received full amounts of their respective debts. Again, it is provided by section 63 sub-section (2), B. A., 1914, that where joint and separate properties are being administered dividends of the joint and separate properties shall, unless otherwise directed by the Board of Trade, on the application of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property. The matter is further amplified by bankruptcy rules 120 and 121, framed under the English Act and which are quoted here for the principles underlying them will be followed by the Indian Courts as well.

“Rule 120.—In the case of a bankruptcy petition against a partnership, the costs payable out of the estates incurred up to and inclusive of the receiving order shall be apportioned between the joint and separate estates in such proportions as the Official Receiver may in his discretion determine.

S. 64. Rule 121. —(1) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the Official Receiver may pay or direct the trustee to pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as in his discretion the Official Receiver may think fit. The Official Receiver may also, as in his discretion he may think fit, pay or direct the trustee to pay any costs or charges properly incurred, prior to the appointment of the trustee, for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate.

(2) Where the joint estate of any co debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee, with such consent as is hereinafter mentioned, may pay such costs or charges out of the separate estates of such co-debtors or one or more of them. The trustee, with the said consent, may also pay any costs or charges properly incurred, for any separate estate, after his appointment, out of the joint estate, and any part of the costs or charges of the joint estate incurred after his appointment which affects any separate estate out of the separate estate. No payment under this Rule shall be made out of a separate estate or joint estate by a trustee without the consent of the committee of inspection of the estate out of which the payment is intended to be made, or, if such committee withhold or refuse their consent, without an order of the Court."

Notice before final dividend necessary ; consequences of omission to give such notice.— Before declaring a final dividend, it is necessary for the receiver that he should give notice in the manner prescribed by the rules to creditors whose claims have been notified but are not proved, intimating them to prove their claims within the time limited by such notice. After service of such notice on the creditors, if they fail to prove their debts within the time so fixed or within the time, if extended by the court, the receiver is not to wait for them but is to declare the final dividend. The notice contemplated by the section is not one calling upon the public generally but to each creditor individually (1). Omission to give notice to a creditor who has lodged his proof but, through oversight in the office of the official assignee, whose name is not included in the list of creditors, entitles such creditor to re-open the distribution of dividend (2). Where a declaration of dividend is set aside, the creditors who have received dividends may be ordered to repay the excess of the dividends which have been paid to them over and above the amount which they may be entitled to receive in common with the other creditors (3). Where a declaration of dividend is set aside, the court will allow a creditor whose claim was not notified to the official assignee to come in and prove, and his name will be included in the list of creditors, in which case he will be entitled to share rateably with all other creditors. This proceeds on the ground that where a declaration is set aside, there is no valid declaration at all of dividend (4).

(1) *Hiranand Mulchand v. Official Receiver*, 100 I. C. 791.

(2) *Re Ram Chandra Ganuji Waiker*, 1927, 29 B. L. R. 1167; *Krishna Chinnu & Sons v. Mathubhai*, 1929, 53 Bom. 290; 117 I. C. 440; A. I. R. 1929, Bom. 107; *Venkata Narayan v. Sevugan*, 47 Mad. 916; A. I. R. 1924 Mad. 769; 80 I. C. 620.

(3) *Re Ram Chandar Ganuji Waiker*, (1927) 29 B. L. R. 1167.

(4) *Re Ram Chandra Ganuji Waiker supra*.

Creditors to whom notice is necessary.—The official receiver is bound to give notice under the section to all those persons whose claims to be creditors have been notified to him, *i.e.*, not only to those creditors who have notified their claims, but to all such creditors whose claims have been notified to the official receiver either by the creditors themselves or by the insolvent (1). S. 65.

Form of notice.—The form of notice under the section is prescribed by the rules.

Reduction of proof.—As already noted, a declaration of dividend may be set aside in certain cases and the creditors may be ordered to repay the excess of the dividends received by them. The amount of dividend may be reduced on other grounds also.

To whom is dividend to be paid.—The dividend is to be paid by the receiver to the creditors who have proved their debts. An assignee of a debt due to a creditor who has proved is not such a creditor and he cannot obtain an order for payment to him of the dividends, but after satisfying the trustee of the validity of the assignment, he can apply to the court to give leave to the trustee to place on the file a proof by him in substitution for the proof of the assignor (2). The receiver is however entitled to retain the dividends against the assignee to satisfy costs which the assignor has been ordered to pay to him (3).

Dividend not a debt.—It has been held by the Madras High Court that section 4, Succession Act, is not applicable to the payment of dividends by the receiver under this section (4). In England it has also been held that a dividend is not a debt and it cannot be attached by a garnishee notice.

Scope.—Section 64 does not control the proviso to section 63 of the Act. So where the first dividend happens to be the final dividend, the creditor who comes in late is still subject to the proviso of section 63 and he is not entitled to disturb the dividends already distributed on the ground that no individual notices were sent by the receiver to the creditors whose claims had been notified but not proved (5).

65. No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the Schedule, order him to pay it and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

History and analogous law—This is section 39, sub-section (5) of the Act III of 1907. The corresponding section of the Presidency-towns

(1) *In re Sundarji-Bhimji*, 107 I. C. 439 : 22 S. L. R. 475 : A. I. R. 1928 Sind 105.

(2) *Re Frost*, (1899) 2 Q. B. 50 ; *Re Illiff*, 51 W. R. 80 ; *Re Hills*, 107 L. T. 95.

(3) *Re Mayne*, (1907) 2 K. B. 899.

(4) *Amayachi v. Ram Chandra Iyer*, 49 Mad. 953 : 1926 M. W. N. 560.

(5) *Vrijlal-Mansukhram v. Chuni Lal*, 131 I. C. 881 : 55 Bom. 200 A. I. R. 1931 Bom. 210.

- S 66.** Insolvency Act is section 74, which corresponds to S. 63, B. A. of 1883 and S. 68, B. A. of 1914.

What is refusal to pay.—In an English case, after the declaration of a dividend, a party who had proved his debt had asked the official assignee, by letter, to send him the amount of his dividend through the post office and promised to send a receipt by return of post. The official assignee did not send any answer. It was held that the silence of the official assignee amounted to such a refusal to pay the dividend as entitled the creditor to an order upon petition at the costs of the official assignee personally (1).

Creditor's remedy.—If the receiver has refused to pay any dividend to a creditor, he may make an application to the court against the receiver's act, and the court may thereupon make an order directing the receiver not only to pay the amount of the dividend but also to pay interest thereon out of his own money for the time that it is withheld and the costs of the application. If the trustee has money in his hands, the mere fact that the trustee has been released does not prevent the court from having jurisdiction to pass such an order upon him (2). In another case where the trustee had no money in his hands, an application against the trustee, after the discharge of the debtor, for payment of rent which had accrued due prior to the discharge was refused (3). The section indicates that ordinarily the personal liability of the receiver extends to the payment of interest only and not to the amount of the dividends of which a creditor has been deprived by his refusal. Where, however, the loss of the creditor has resulted on account of negligence and serious failure of duty on the part of the receiver, he can be made personally liable even for the dividend amounts (4).

66. (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct

(2) The Court may, from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate; but any such allowance may, at any time, be varied or determined by the Court.

History.—The section reproduces section 40 of the Act III of 1907.

Analogous law.—S. 75, P.-t. I. A., gives the power given in sub-section (1), *i. e.*, management of property by the insolvent himself, to

(1) *Exp. Jackson*, (1842) 3 Mont. D. & D. 1.

(2) *Re Prager*, (1876) 3 Ch. D. 115.

(3) *Exp. Carter*, 8 Ch. D. 731.

(4) *In re Archibald Gilchrist Peace*, 25 C. W. N. 653.

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the official assignee. Section 75, but for this difference, is in the same terms. The corresponding sections 57 and 58, B. A., 1914, give the same powers to the trustee in bankruptcy, with the permission of the committee of inspection. Rule 370 of the English Act provides that when, under the provisions of section 58 of that Act, a trustee makes an allowance to a bankrupt out of his property, such allowance, unless the creditors by special resolution determine otherwise, shall be in money, and the amount allowed shall be duly entered in the trustee's accounts (1).

Sub-section (1).—Under the sub-section, the court may allow the insolvent to carry on his business for the benefit of his creditors. In acting like that he will be merely acting as an agent of the receiver. And the receiver is bound to pay all debts incurred by the insolvent in the course of such business. In England, the rights of subsequent creditors, where a bankrupt was allowed to continue trade and incur fresh debts, were considered in many cases (2). Now the matter is governed there by express legislation (3). The Provincial Insolvency Act does not contain any provisions determining the rights of creditors who so advance money to the insolvent. As those debts are incurred after adjudication, they are clearly not provable in the bankruptcy. It appears that such debts will be considered to be expenses of administration and shall constitute a first charge on the property of the insolvent in the hands of the receiver, whether acquired before or after the order of adjudication.

Sub-section (2) ; allowance to insolvent.—The court may make allowance out of the insolvent's property to him for his support and the support of his family or as remuneration for services rendered by him in winding up the estate. The right to have maintenance under the section is that of the insolvent himself. The members of his family cannot ask for separate maintenance independently of him (4). The section does not contemplate that a house, belonging to the insolvent, should be reserved for the residence or maintenance of the insolvent's wife or family (5).

Under section 60, Civil Procedure Code, half the salary of a debtor, when he is drawing more than hundred rupees, is exempt from attachment. Section 23 (2) and (5), when read with that section of the Code of Civil Procedure, has the effect of vesting only half the salary in the receiver and making it available for distribution amongst his creditors. On these grounds it was held in some cases that where the insolvent was a salaried man and half his salary was exempt from attachment, the court had no authority to allow more than half the insolvent's salary for the maintenance of himself and his family (6). This view was, however, dissented from, and it has now been held that under the sub-section the insolvency courts in this country, in spite of the fact that they cannot attach half the salary which is removed from the grasp of creditors by section 60, C. P. C., have an absolute discretion to make a further

(1) See also *Khushiram v. Mst Sat Bhawan*, 123 I. C. 320 : 31 P. L. R. 661, where it was held that the allowance should be in the form of money.

(2) *Engleback v. Nixon*, L. R. 10 C. P. 645 ; *Exp. Robertson*, L. R. 8 Ch. 962 ; *Wadling v. Oliphant*, 1 Q. B. D. 145 ; *Exp. Ford*, 1 Ch. D. 521 ; *Exp. Russell*, 2 Ch. D. 324 ; *Re Dowling*, 4 Ch. 689 ; *Exp. Bolland*, 9 Ch. D. 312.

(3) Sec. 47, B. A. of 1914 and Sec. 3 of the Act of 1926.

(4) *Murad v. Official Receiver*, A. I. R. 1935 Lah. 952.

(5) *Khushi Ram v. Sat Bhawan*, 31 P. L. R. 661.

(6) *Tulsi Ram v. Girsham*, 38 I. C. 410 : A. I. R. 1917 U. B. 1. .

- S 67. reasonable allowance appropriate to the conditions and the circumstances of the insolvent out of the remaining half which is otherwise divisible amongst the creditors (1). In cases in which a question arises as to what sum should be paid out of the insolvent's salary for the benefit of his creditors, there being no other assets available, the burden must be shared equitably between the insolvent, the members of his family and the creditors (2). The court is not restricted to making an allowance which is immediately necessary for support of life. It can make a provision that will enable the insolvent hereafter to support himself and his family rather than be a constant drain on the estate throughout the whole period of the insolvency. It should not, however, permit the use of funds lying in the estate for the defence of criminal charges utterly disconnected with the insolvency (3).

67 The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings thereunder.

Right of insolvent to surplus.

History and analogous law—This is section 41 of the Act III of 1907, and corresponds to section 76, P-t. I A, 1909, S. 65, B. A. of 1883 and S. 69, B. A., 1914.

Nature of the bankrupt's right in the surplus—The trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy—and that bankruptcy only—payment of principal and interest and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the surplus. But this interest in the surplus will not give the bankrupt, or his assignee, while the bankruptcy is pending, any right to interfere in the administration of the property or the conduct of the proceedings (4). His right to the surplus is, however, one which the bankrupt can dispose of by will or deed or otherwise during the pendency of the bankruptcy, even before the surplus is ascertained, although such disposition will be ineffectual unless and until there proves to be a surplus (5). Under the Act of 1849, it was held that the surplus money due to a bankrupt out of his estate after payment of twenty shillings in the pound was not a debt due to the bankrupt from the official assignee which could be attached by a judgment-creditor (6); but on a proper application the registrar has jurisdiction to make an order by way of equitable execution charging the fund with payment of an unsatisfied judgment-debt (7).

Where in the exercise of the father's power of disposal, the official receiver sold the family property including the shares of the sons, the

(1) *Radha v. M. C. White*, 73 I. C. 413 : 45 All. 364 : A. I. R. 1923 All 466 ; *Raj Singh v. Official Receiver, Lahore*, 160 I. C. 173 : A. I. R. 1935 Lah. 810.

(2) In the matter of *Maung Pin Ayea*, A. I. R. 1936 Rang. 412.

(3) *Aladappa Chhettiar v. Official Assignee*, A. I. R. 1936 Mad. 414 : 161 I. C. 947 (Ss. 75 and 85, P-t. I A).

(4) *Exp. Sheffield*, 10 Ch. D. 434 ; *Re Leadbitter*, 10 Ch. D. 388.

(5) *Bird v. Philpott*, (1900) 1 Ch. 822.

(6) *Hunter v. Greensill*, L. R. 8 C. P. 24.

(7) *Re Prior*, 1921. 3 K. R. 222.

surplus, if any, remaining after the satisfaction of the father's creditors, **S. 67A.** should be returned to the sons (1).

Surplus after distribution under composition.—Where the creditors agree to a composition upon the terms that the estate of the insolvent should be transferred to a third person, and that such person should guarantee payment of the composition, and the transfer is made and the guarantee given, and the order of adjudication is annulled, the surplus after payment in full to the creditors belongs not to the transferee, but to the insolvent (2).

Payment in full with interest as provided by this Act.—Interest at the contract rate up to the date of the order of adjudication forms part of the debt and is provable in insolvency with the principal. Interest after the order of adjudication may be allowed at the rate of six per cent. per annum under section 61, sub-section (6). Payment in full under section 67, however, means payment of principal and interest at the contract rate from the date of the debt till the date of the payment (3). In this connection also see commentary under section 48 where all the provisions relating to interest are collected and considered at length.

67A. (1) The Court may, if it thinks fit, authorise the creditors who have proved their debts to appoint a committee of inspection for the purpose of superintending the administration of the insolvent's property by the receiver.

(2) The persons appointed to a committee of inspection shall be creditors who have proved their debts or persons holding general powers of attorney from such creditors.

(3) The committee of inspection shall have such powers of control over proceedings of the receiver as may be prescribed.

History.—This section was added by section 5 of the Act 39 of 1926. Before the amendment there was no such provision in the Act even though there were sections 88 and 89, P-t. I. A., III of 1909, providing for the setting up of a committee of inspection by the creditors for the purpose of superintending the administration of the insolvent's property by the receiver. In 1920, the Civil Justice Committee made a recommendation for the purpose to the following effect: "There is not in the Act of 1920 any provision corresponding to the provision of the Presidency-towns Act for a committee of inspection in sections 88 and 89. So little use is made of these sections in Presidency-towns that one hesitates to recommend their introduction into the mofussil. In principle, however, it seems hopeless to expect good administration of a fund which really belongs to the creditors unless the creditors are given a means whereby

(1) *Hari Das v. Lallu Bhai*, 55 Bom. 110; 129 I. C. 153; A. I. R. 1931 Bom. 50.

(2) *Subbaraya v. Vythilinga*, 1893, 16 Mad. 85.

(3) *China Venkataraju v. Lakshmanaswami*, 134 I. C. 169; A. I. R. 1931 Mad. 729.

- S. 68** they may have a proper voice in superintending the administration. Under the Presidency-towns Act, a committee of inspection does not come into existence unless the Court thinks fit to authorise the creditors, who have proved, to appoint one. We should very much like to see a commencement made in this respect at all events in some of the larger towns which come under the Provincial Act (1)

The addition of the present section gives effect to the above recommendation of the Civil Justice Committee (2).

Analogous law—The present section follows the Presidency-towns Act, which contains a similar provision in sections 88 and 89. The corresponding provisions of the English Acts are section 22, clause (1) of the Act of 1883, and section 20, B 1 of 1914. The English sections are much more comprehensive and definite. Under the Indian Acts, the constitution of the committee, the number of members, procedure of meetings, etc., has been left by the legislature to be regulated by rules.

Sub-section (3); prescribed.—No rules prescribing a committee's powers of control over the proceedings of the receiver have yet been framed under the Act. Under the Presidency-towns Insolvency Act, however, rules have been framed, which generally follow the English provisions.

Appeal to Court against Receiver.

68. If the insolvent or any of the creditors or any other person aggrieved by any act or decision of the receiver, he may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just :

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.

History.—The section is an exact reproduction of section 22 of the Act III of 1907.

Analogous law—The section corresponds to S. 86, P-t. I. A., 1909, S. 89, B. A., 1883 and S. 80, B. A. of 1914, which provide for appeals to the court from the acts or decisions of the official assignee or trustee.

Scope.—The section provides for an application to the court against the acts or decisions of the receiver. Under section 59 the receiver has authority to discharge many important duties in the distribution and realization of the insolvent's property without any reference to the court. For instance, he may take possession of any property of the insolvent and sell it. Such property might be claimed by a stranger as

(1) Civil Justice Committee Report, page 235.

(2) Statements of Objects and Reasons, Gazette of India, Part 5, dated 21st August, 1936, pages 136-137.

his own. In such a case the remedy of the stranger, though not the exclusive remedy, is to make an application to the court under section 68 S 68. (1). Under section 80 the High Court can invest the official receiver with functions of a more important and judicial nature. Acts or decisions of the receiver made in the exercise of those powers are also appealable under the section, as the section is quite general and extends to all orders of the official receiver (2). The court has jurisdiction to deal with an application by a person who purports to have purchased the property of the insolvent at a sale held by the official receiver to the effect that his bid might be accepted and that a subsequent sale to another person be held invalid. The reason is that it falls within the scope of S. 22, P. I. A., 1907 (3). V having been adjudicated insolvent, his property vested in the official receiver. V had on 24th May, 1908, executed in favour of his father, the respondent, a pronote and an agreement, the latter providing that in case the former was not discharged within a year, it should be discharged by the conveyance of certain property. On 6th October, 1913, the respondent asked the court to order the receiver to execute the necessary conveyance alleging that he had already put in an application for such execution either by the court or receiver and that no order had been passed thereon. One of the creditors who held a mortgage over the property opposed the petition. The receiver was not made a party originally to the proceedings in the lower court, but the High Court remanded the case for the receiver to be made a party. The receiver had no objection to execute the conveyance and accordingly the court directed its execution. It was held on appeal by the mortgagee creditor that the application of the 6th October, 1913, having been founded on the failure of the respondent's previous petition to the court and not to the receiver, the order of the court was without jurisdiction, not falling under section 22.

The section allows a period of 21 days to an aggrieved person for complaining against the act of the receiver. The court has, therefore, no jurisdiction to confirm an act or decision of the receiver until 21 days have elapsed within which an aggrieved person can apply to the court for reversal or modification of the act or decision of the receiver. Even if it is done, an appeal by him shall not be barred provided it is made within 21 days of the act complained of (4).

Section does not bar other remedies of the aggrieved person.—

A person who is aggrieved by an act of the receiver has three alternative remedies open to him :—

(i) he may make an application or appeal under section 68 to the court ;

(ii) he may, subject to section 28 (2), bring a separate suit in the ordinary courts of law ; or

(1) *Mul Chand v. Murari Lal*, 21 I. C. 702 : 36 All. 8 : A. I. R. 1914 All. 212.

(2) *Chidambaram Chetty v. Nagappa Chetty*, 16 I. C. 820 : 38 Mad. 15 : A. I. R. 1916 Mad. 1014.

(3) *Banalinga Pillai v. Official Receiver, Trichinopoly*, 64 I. C. 524 : A. I. R. 1921 Mad. 313.

(4) *Gobind Chandra v. Hari Charan*, 94 I. C. 332 : A. I. R. 1926 Cal. 826.

S. 68. (iii) he may make an application under section 4 of the Act.

The third remedy did not exist under the Act III of 1907. It is open to the aggrieved person to bring a separate suit without making an application under section 68 (1). There is, however, a difference of opinion as to whether an aggrieved person, after he has availed of his remedy under section 68 and failed, can pursue the other remedies of bringing a separate suit in the ordinary courts or of making an application under section 4. It has been held by the Allahabad High Court that an application under the section is in the nature of a suit arising out of an executive act which raises the question of title to the property of the debtor on the one hand and of those claiming adversely to him on the other, and that, if there is a decision under the section on the merits, it shall bar a subsequent suit in the ordinary courts on the general principles of *res judicata* (1). The Lower Burma Chief Court held a different view, namely, S. 22, P. I. A., 1907, does not contemplate that a lengthy inquiry should be held on a complaint against the irregularity of a sale held by the receiver in an insolvency case as if the matter was a regular claim and that an order under that section does not preclude a party from pursuing his ordinary remedy by a suit against the receiver (3).

As regards the aggrieved person's remedy under section 4 it has been held by the Rangoon High Court that where an appeal under section 68 is open, an application under section 4 does not lie on the ground that section 4 defines the powers of the court in deciding an application only and that it does not provide as to how the court is to be moved to exercise its powers (4). In a Lahore case it was held that the remedy under section 4 is open but the application must in all cases be made within twenty-one days and that an application barred by time under section 68 cannot be considered as an application under section 4, even though it raises questions falling under the latter section. The ground of the decision was that section 4 is to be read subject to the other provisions of the Act and that section 68 is one of such provisions (5). In another Lahore ruling the case last cited was doubted and not followed in very similar circumstances (6). The Madras High Court has held that the remedy under section 4 is much larger than that provided for in section 68, and that where the official receiver passes an order on a claim petition, which he has no jurisdiction to pass, even

(1) *Halima v. Mathradas*, 40 I. C. 122 : A. I. R. 1917 Sind 22; *Maharana Kanwar v. David*, 77 I. C. 57 : 46 All. 10 : A. I. R. 1921 All. 40.

(2) *Pitaram v. Jujhar Singh*, 33 I. C. 793 : 39 All. 626 : A. I. R. 1918 All. 346; *Irshad Hussain v. Gopinath*, 49 I. C. 590 : A. I. R. 1919 All. 229 : 41 All. 378; *Bhairo Prashad v. S. P. C. Dass*, 51 I. C. 113 : A. I. R. 1919 All. 274; *Kundanlal v. Khemchand*, 70 I. C. 97 : 44 All. 620 : A. I. R. 1922 All. 407, on facts it was held that there was no determination on the merits under section 22.

(3) *Raman Chetty v. A. V. Firm*, 9 B. L. T. 61 : 31 I. C. 884 : A. I. R. 1915 L. B. 35 : see also *Sanchi J. Karamchand*, A. I. R. 1923 Lah. 150 (2) : 73 I. C. 705; *Harnau v. Ganpat*, 73 I. C. 367 : A. I. R. 1923 Lah. 224 and *Ram Piyara v. Bhanamal*, 2 Lah. 147 : 61 I. C. 332 : A. I. R. 1921 Lah. 58.

(4) *Ma Sein Nu v. U Mg. Mg.*, A. I. R. 1934 Rang. 97 : 149 I. C. 43.

(5) *Jai Kishan Das v. Chirag Din*, A. I. R. 1937 Lah. 60.

(6) *Salig Ram v. Balak Ram*, A. I. R. 1936 Lah. 19.

though no appeal is filed under section 68 within twenty-one days, an application under section 4 lies (1). **S. 68.**

The relationship of sections 68 and 4 has also been considered for deciding the competency of a second appeal to the High Court from the order of a district judge passed in appeal from an order of the subordinate judge under section 68. In one Lahore case a second appeal was held incompetent, even though there was a question of title, on the ground that section 4 is to be read subject to the other provisions of the Act (2). In subsequent decisions of the same High Court the contrary was held (3). On this subject reference may also be made to notes on section 80 under the heading, "official receiver is not a court."

In this connection it is important to note that the order of the insolvency court under section 68 is passed on the merits and one which it can legally make. It shall not apply where the insolvency court's order is without jurisdiction. Where a receiver in insolvency attached certain timber as the property of the insolvent and two persons laid claim to it, the judge in insolvency ordered it to one, whereupon the other brought a suit against the rival claimant, it was held that the suit was maintainable and the principle of *res judicata* did not apply. The ground of the decision was that the insolvency judge could decide only as to whether the attachment could be maintained or not and that he could not decide between the claims of the rival claimants (4). S. 22, P. I. A., 1907, (now section 68) will not bar a subsequent suit by a stranger claimant where his objection is disallowed not by the insolvency court but by a court executing a decree against the insolvent (5).

Who can apply under the section.—The expression "the insolvent or any of the creditors or any other person aggrieved" is very similar to that used in section 75 and the decisions as to who is a person aggrieved under that section are applicable under the present section as well. An official receiver, in whom the property of the insolvent vested under an order of adjudication passed against him, issued a proclamation for sale of certain properties, subject to two mortgages subsisting thereon. On the date fixed for the sale, he varied the sale proclamation by noting that the properties would be sold free from the mortgages, and sold the properties. It was held that the creditors had a right to apply under S. 22, P. I. A., 1907, against the action of the receiver (6). Where, in the course of insolvency proceedings, the official receiver ordered the sale of property alleged to have belonged to the insolvent and rejected an application

(1) Venkatarama Chetty v. Angathayamall, 146 I. C. 204 : A. I. R. 1933 Mad. 471.

(2) Abdullah v. Shankar Das, A. I. R. 1936 Lah. 502 : 160 I. C. 921.

(3) Daulat Ram Vidia Prakash v. Bansi Lal, A. I. R. 1937 Lah. 2 ; Mool Raj v. Official Receiver Jhelum, A. I. R. 1937 Lah. 297 ; Gandaram Shivanand v. Ganesh Das, A. I. R. 1937 Lah. 757 (in all these cases the order from which a second appeal was filed was passed by the district judge in appeal from an order of the subordinate insolvency judge on an application under section 68).

(4) Hukumat Rai v. Padam Narain, 39 All. 353 : 38 I. C. 751 : A. I. R. 1917 All. 157.

(5) Mohani v. Baijnath, 16 A. L. J. 456 : 40 All. 582 : 46 I. C. 394 : A. I. R. 1918 All. 363 (1).

(6) Thiruvankata Chariar v. Thangia Ammal, 39 Mad. 479 : 29 I. C. 294 : A. I. R. 1915 Mad. 1177.

S. 63 put in by the insolvent's sons asking that the property should not be sold as it did not belong to the insolvent, stating that the question of whether the property belonged to the insolvent was for the ordinary civil courts to decide and that the claim would be a title at the time of the sale, it was held that the sons were persons aggrieved within the meaning of S. 22, P. I. A., 1907 (1). Where a receiver in insolvency at the instance of a creditor attaches and takes possession of property as the property of the insolvent, a third person claiming to be its owner becomes aggrieved within the meaning of S. 22, P. I. A., (2). Where a Hindu father who has been adjudicated insolvent had already sold the property, including interests of his sons, acting as their guardian during their minority, then, although the sales have been declared void as against the receiver, the sons have, because of the previous sale of their shares by their father, no *locus standi* to apply under section 68, if the order setting aside the sale does not show that it was not binding on the sons (3). During the administration of an insolvent estate the insolvent has no legal interest in the property vested in the trustee. He is not, therefore, a person aggrieved in the legal sense of the word by a sale of the property in which he has no interest (4).

For fuller discussion of the whole subject, see commentary under section 75.

Act or decision of the receiver.—The sale of the property of the insolvent by the receiver is an act of the receiver within section 68 (5). Attachment and seizure of property by the receiver is also an act. But where the attachment takes place under an order of the court to that effect, it cannot be said to be the act of the receiver and an application to set it aside may only be entertained under section 4 (6). Under the Act III of 1907 there was a difference of opinion as to whether the receiver's refusal to apply for setting aside a transfer under Ss 53 and 54, P. I. A., 1920 (corresponding to Ss. 36 and 37, P. I. A., 1907), was an act of the receiver within the meaning of S. 22, P. I. A., 1907 (now section 68), or not. We have dealt with this conflict under section 54 A.

Court's power under the section.—On an application under the section, the court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just. The powers of the court are practically unlimited. It has an unfettered discretion to set aside an order passed by a receiver (7). Though the power of interference is unrestricted the court will not ordinarily interfere with an order passed by the receiver in the exercise of his discretion, except where proper reasons are shown that the action of the receiver was irregular

(1) *Alagappa Chettiar v. Nagratan Mudaliar*, 42 I. C. 789 : A. I. R. 1918 Mad. 497.

(2) *Charu Chandra v. Hemchandra*, 47 I. C. 62 : A. I. R. 1918 Cal. 303.

(3) *Viranna v. Venkatarammya*, 98 I. C. 1065 : A. I. R. 1927 Mad. 232.

(4) *Sakhawat Ali v. Radha Mohan*, 41 All. 243 : 49 I. C. 816 : A. I. R. 1919 All. 284. See *contra* *Shakarkhan v. Sanmukh Singh*, 136 I. C. 267 : A. I. R. 1932 Lah. 320.

(5) *Venkatachalan Chettyar v. Murugesan Servai*, 9 Rang 31 : 131 I. C. 732 : A. I. R. 1931 Rang. 122.

(6) *Nathuram v. Madangopal*, 133 I. C. 791 : A. I. R. 1932 All. 408.

(7) 7 B. L. R. 954 : *Woonwala & Co. v. N. C. Macleod*, 30 Bom. 515 ; *Thiruvankatachiar v. Thangia Ammal*, 39 Mad. 479 : 29 I. C. 294 : A. I. R. 1915 Mad. 1177.

and has prejudiced the interests of creditors (1). Where the sale is found by the court to be neither fair nor just, the court will set it aside under the section. Where the two creditors of the insolvent are the only two prospective bidders, it is neither fair nor reasonable that the receiver should hold the sale in the absence of the other creditors at an earlier hour than that at which sales normally are held and long before the other creditors could reasonably be expected to be present and without making inquiries to ascertain whether those creditors were at that place or without giving them any opportunity to be present when the sale took place ; and the sale, if held, will be set aside (2). Where, in a sale held by public auction by the official receiver a person makes the highest bid and deposits one-fourth of the price, but subsequently another person makes a higher bid and the official receiver executes a sale deed in his favour the insolvency court cannot set aside the sale on the application of the first bidder summarily. In such a case the court should leave the controversy to be settled in more appropriate proceedings, granting leave, if necessary, for a suit against the receiver and the third person claiming rights under the sale deed (3). For other cases see commentary under section 59. S. 68.

Court's other powers over the receiver.—Apart from the section, the receiver is an officer of the court and as such the insolvency court has inherent powers of supervision and superintendence over the proceedings of the receiver. The insolvency court can, therefore, even where section 68 does not apply, give directions to or set aside the orders or acts of the receiver (4). The court may exercise its inherent power of its own accord or even at the instance of another person who may bring the matter to the notice of the court (5). In a Madras case, the court refused to go into the validity of a sale where the aggrieved party had not appealed against the official receiver's act under section 68, but there the inherent jurisdiction of the court was neither invoked nor, it seems, the case was a fit one for interference (6).

Proviso : limitation.—Under the section the court can entertain an application by an aggrieved person against an act or decision of the receiver only if it is made within 21 days from the date of the act or decision complained of. If the application is not made within the time limited, the court is not bound to hear and it is liable to be dismissed (7). Although the act or decision of the receiver must be challenged by an application

(1) *Exp. Lloyd*, 47 L. T. 64; *Thiruvengatchariar v. Thangia Ammal supra*; *Rama Badra Chetty v. Rama Swami Chetty*, 73 L. C. 374 : A. I. R. 1923 Mad. 350.

(2) *Venkatachalan Chettyar v. Murugesan Servai*, 9 Rang. 231 : 131 I. C. 732 : A. I. R. 1931 Rang. 122.

(3) *Keshab Deb v. B. R. K. Bhattacharji*, Official Receiver, A. I. R. 1935 All. 687 : 155 L. C. 563.

(4) *Ayanashi Chetty v. Muthukaruppa Chetti*, 44 I. C. 885 : A. I. R. 1918 Mad. 136; *Haveli Shah v. Mst. Zohra Jan*, A. I. R. 1932 Lah. 84 : 133 L. C. 876.

(5) *Ex-parte Cochrane*, 1875, L. R. 20 Eq. 282; *Searle v. Choat*, (1884) 25 Ch. D. 723 : 32 W. R. 397; *In re Rasul Haji Cassum*, (1910) 9 I. C. 344; *Hanseswar Ghosh v. Rakhalidas*, 20 I. C. 683 : A. I. R. 1914 Cal. 885; *Dataram v. Deoki Nandan*, 1 Lah. 307 : 58 L. C. 6 : A. I. R. 1920 Lah. 361.

(6) *Panja Ramchandra Rao v. Gurraju*, 76 I. C. 977 : A. I. R. 1924 Mad. 147.

(7) *Shakar Khan v. Sanmukh Singh*, 136 I. C. 267 : 33 P. L. R. 332 : A. I. R. 1932 Lah. 320; *Mst. Husaini Bibi v. Mohammed Zahirabdi*, 74 I. C. 802 : 26 O. C. 319 : A. I. R. 1924 Od. 294.

- S. 69. presented within 21 days from the date of such act or decision, there nothing in the act to show that all the grounds upon which it is challenge must be stated in that application or that the grounds mentioned there may not be supplemented or amplified later on (1).

The period of 21 days commences from the act or decision complained of. Where, therefore, the sale by the official receiver was confirmed by the court before the expiry of 21 days but the appeal was filed within 21 days from the date of the sale, it was held that the application under section 68 was competent, the court's action in confirming the sale before 21 days being without jurisdiction (2). An order rejecting proof of claim before notice is issued is appealable. But when an order has been duly issued and a party is apprised of that order, time with run, even though it is directed that a notice of that order shall be sent (3).

Miscellaneous.—Other creditors opposed a claim of one creditor in proceedings before the official receiver. The creditor on failure appealed to the district court without making the official receiver a party. It was held that there was no illegality and that the district court could act on the evidence recorded by the official receiver, who, however, could, if he choose appear and claim to be heard (4).

PART IV.

PENALTIES.

69. If a debtor, whether before or after the making of an order of adjudication,—
Offence by debtors.

- (a) wilfully fails to perform the duties imposed on him by section 22 or deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorised by the Court to take possession of it, or
- (b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,—
- (i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(1) *Hem Chandra v. Uma Sodhan*, 103 I. C. 695 : A. I. R. 1927 Cal. 834.

(2) *Charu Chandra v. Hem Chandra*, 47 I. C. 62 : A. I. R. 1918 Cal. 303.

(3) *Vedavathi v. Sadasiva Rao*, 57 Mad. 1030 : 153 I. C. 167 : A. I. R. 1935 Mad. 149.

(4) *Kumara Swami Nadar v. Venkataswamy Koundan*, 78 I. C. 857 : A. I. R. 1924 Mad. 830 : 46 M. L. J. 242.

- (ii) has kept or caused to be kept false books, or S. 69
- (iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or
- (c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—
 - (i) has discharged or concealed any debt due to or from him, or
 - (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

shall be punishable on conviction with imprisonment which may extend to one year.

History.—This section is new. The law of penalties (including the substantive as well as the procedural law) was contained in section 43 of the Act III of 1907. It ran as follows :—

“(1) Every debtor, whether before or after the making of an order of adjudication, shall produce all books of account, give such inventories of his property, and such lists of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally give such aid in the realisation of his property and the distribution of the proceeds amongst his creditors, as may be required by the Court or receiver, or as may be prescribed.

(2) If a debtor, whether before or after the making of an order of adjudication,—

- (a) wilfully makes false entries in the inventories or lists referred to in sub-section (1), or
- (b) fraudulently or vexatiously conceals, destroys, transfers, removes or refuses to produce any property or books of account, or
- (c) commits any other acts of bad faith in the performance of the duties imposed on him by the section,

The Court may sentence him, by order in writing, to simple imprisonment for a term which may extend to one year; and in every such case the Court shall record the facts constituting the offence with the statement (if any) made by the debtor,”

From S 43, P. I. A., 1907, as quoted above, it will appear that the section is not only not precise but also it does not give the details of procedure. Besides, the insolvency court itself had authority to try the debtor and sentence him. The lack of precision in defining the

S. 69. offences and prescribing the procedure to be adopted by the court frequently created difficulties, and proceedings instituted against fraudulent insolvents were often infructuous. When the Act V of 1920 was to be enacted, it was thought desirable to bring the law into line with that to be found in section 103 and the subsequent sections of the Presidency-towns Insolvency Act. Section 43, sub-section (2) was repealed and substituted by part 4, consisting of sections 69 to 73 of the present Act and section 43, sub section (1) was re-enacted as section 22 in the Act. In the section, as it stood before 1927, the last but one line was: "He shall be punishable on conviction by the court with imprisonment." In 1926, section 70 was amended and as a result of that amendment, subsequently the words "by the Court," were omitted by the Schedule under section 2 of the Repealing Act, Act XII of 1927. For fuller treatment of this point, see commentary under section 70.

Analogous law—Offences under the Presidency-towns Insolvency Act are defined in section 103 of that Act. The present section is substantially the same as section 103 except that the punishment under the latter Act is two years, instead of one year, and that one offence referred to under section 69 (a) of the Provincial Insolvency Act, namely, 'wilfully failing to perform the duties imposed on the insolvent by this Act,' is not mentioned in section 103, P-t. I. A. The reason for this omission is that they are separately provided for in that Act. Under the Presidency-towns Insolvency Act, the duties which an insolvent is to perform under section 22, P. I. A., are prescribed by section 33. Under that section, failure to perform any one of those duties is a contempt of court and the insolvent is punishable with imprisonment for contempt. Provincial courts have no such power. The Court of the Judicial Commissioner of Sind is not a chartered High Court, but express power to commit for contempt is given to that court by section 90 (8) of the Presidency-towns Insolvency Act.

The relevant provisions of the English law are contained in sections 154 to 166 of Part 7 of B.A., 1914. Section 154 defines many of the offences which we find in section 69, P. I. A. The language is, however, different and the sections, because they deal with criminal offences, are different in their scope and object. There are two main points of difference between the English and the Indian Law. One is that many of the offences in the English Act are punishable only if they are committed after the presentation of the petition, whereas under the Indian law offences committed at any time before the order of adjudication (and that means even before the presentation of the petition) are punishable. The second point of difference relates to the burden of proof. The English Act places the burden of proof for many of the offences similar to those to be found in S. 69, P. I. A., and S. 103, P-t. I. A., on the accused. For instance, in order that an act specified in section 69, clause (b) (1) to (3) may be an offence, it must be proved to have been done fraudulently with intent to conceal the state of the debtor's affairs or to defeat the object of the Act. In England all that the prosecution has to prove is the act or omission complained of and the onus rests upon the debtor to prove that he had no intent to defraud or that he did not mean to conceal the state of his affairs or to defeat the law. This proceeds on the principle that the debtor is in a position to know all facts which go to prove his innocence and it is therefore for him to prove those facts. S. 106, I. E. A., 1872, also embodies the rule that the burden of proving a fact which is

especially within the knowledge of any person lies upon that person. In India, in regard to insolvency offences, the burden of proof is always on the prosecution, *i. e.*, it is for the prosecution to establish all the ingredients of the offence in bankruptcy just as it is done in the case of other ordinary offences under the Indian Penal Code. S. 69.

Burden of proof.—The burden of proving that the accused has committed an offence under the section lies on the prosecution. The difference between the English and the Indian law on this point has been discussed in the preceding paragraph.

Whether before or after making the order of adjudication.—The expression refers to the time when the offence might have been committed. The insolvency court has jurisdiction to punish a debtor not only for offences which have been committed in the course of insolvency proceedings but also those which were committed before their commencement. In clause (b), 1 and 3, the offence must be in relation to such of his affairs as are subject to investigation under this Act. In regard to other clauses, it is submitted that the court, though it might be technically right in taking action for an offence committed at any time, whether connected with insolvency or not (subject, of course, to all just exceptions), will usually take action only when the matter is connected with insolvency and has affected those proceedings either by making the administration difficult in insolvency or by reducing the assets distributable amongst the creditors. The expression has no reference to the time when the court should take action. It has reference only to the time of the commission of the offence.

When should the court take action.—It is clear that the court can take action at any time after the order of adjudication. It is not bound to wait till the insolvent makes his application for discharge. In some cases it may take action after discharge. The question which has arisen and caused some difference of opinion is as to whether the court can take action before the order of adjudication is passed against the insolvent and secondly, where his petition for insolvency has been dismissed. On the first point it was held, in a case under the old Act, by the Oudh Chief Court that action can be taken against the debtor even before the order of adjudication is passed (1). It was also held by the same Court that the court can take action, where necessary, in respect of acts and omissions mentioned in section 43 of the Act III of 1907 after the order of adjudication and before the insolvent applied for his discharge (2). In the first case the order of adjudication was not actually passed at the time when action was taken. In the second case the opinion of the court was that the existence or non-existence of an adjudication order made no difference.

The Oudh Chief Court relied for its view on the fact that most of the offences described in section 43, sub-section (2) could be committed before the order of adjudication and that under the old section there was no obligation on the debtor to apply for an order of discharge. It was further argued and relied upon that the object of enacting sub-section (2) was to

(1) *Nanhumal v. King Emperor*, 17 O. C. 138 : 25 I. C. 363 : A. I. R 1914 Oudh 386.

(2) *Ram Behari Lal v. Jagannath*, (1917) 19 O. C. 89 : 37 I. C. 628 : A. I. R. 1917 Oudh 386.

- S. 69.** make the court powerful enough to enforce the duties prescribed in sub-section (1) on the debtor, and that there was jurisdiction to prosecute the insolvent as soon as the court found that he was not fulfilling his duties.

The present section has been substituted for the old sub-section (2) of section 43 and its first sentence has been taken from that section. Failure to perform the duties imposed on the debtor by section 43, sub-section (1), P. I. A., 1907 (which is now reproduced in section 22), has been made an offence under clause (a). It would, therefore, appear that the Oudh cases, if correctly decided, are still good law. The point again arose in a Calcutta case. There the petition for insolvency had been dismissed and after the dismissal of the petition an application was made for the prosecution of the debtor under section 69 of the Act alleging that at the time when the interim receiver was appointed under section 22, the debtor had failed, with a fraudulent intention, to deposit all his books of account. It was held that the insolvency court had no jurisdiction to make an order for prosecution (1). The Oudh case of *Ram Behari Lal v. Jagan Nath* (2) was referred to and disapproved. It is submitted that the Calcutta view is correct and that, unless the debtor is actually adjudged insolvent, the court has no jurisdiction on the general ground that the insolvency court, as such, has jurisdiction over a person only when there are insolvency proceedings. The dismissal of the petition for insolvency not only puts an end to the insolvency court's jurisdiction, but it must be understood to mean that it never had. The language of S. 103, P.-t. I. A., is much more clear. It begins by saying "any person adjudged insolvent, who (a) fraudulently with the intent to conceal the state of his affairs" and so on. The power to order prosecution cannot be attached as a condition to an order of discharge (3). Nor the mere fact that proceedings under S. 43, P. I. A., 1907, are contemplated means the annulment of the order of adjudication once passed on an insolvent (4).

Clause (a).—Section 22 is in the same terms as section 43, sub-section (1). Under sub-section (2) of that section it was an offence to make false entries in the inventories or lists referred to therein, to conceal assets or to refuse to produce any property or books of account or to commit any other act of bad faith in the performance of the duties imposed on the debtor by that section. Clause (a) covers all the cases of failure on the debtor's part to perform those duties and also the refusal to deliver property which is in his possession. Here it may be noted that the word 'property' includes books of account, which vest on adjudication in the receiver.

The failure to perform the duties under section 22 or to deliver property, etc., to the receiver must be wilful in order to make it an offence. Where the accused is charged with the offence of not producing his account books it will have to be proved that the account books required to be produced were in the possession or power of the debtor (5). Clause (b) (i)

(1) *Ganga Bishnu Singha v. Kahn & Co.*, A. I. R. 1931 Cal. 508 : 58 Cal. 334 : 134 I. C. 534.

(2) 19 O. C. 89 *supra*.

(3) *Mirza Ali v. Qadari Khanam*, 50 I. C. 774 : A. I. R. 1919 Lah. 139.

(4) *Seshaiyengar v. Venkatachalam*, 31 I. C. 15 : A. I. R. 1916 Mad. 1088.

(5) *Akhoy Chand Begwani v. Emperor*, A. I. R. 1934 Cal. 409 : 149 I. C. 352 : 61 Cal. 537.

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also deals with a case where a debtor purposely withholds the production of any document. But the offences mentioned in the two clauses are distinct and the elements of the offences are not the same. On a charge framed under section 60 (a), the court cannot convict an accused under section 69 (b), as there may be prejudice to the accused, if such a procedure is adopted. One of the duties laid upon the insolvent by section 22 is to give an inventory of his property. If he wilfully fails to disclose any item of his property therein, it is an offence under section 69. But failure to disclose, arising from negligence or mistake, is not an offence (1). Thus where an insolvent omitted to include in his schedule of properties his right to the equity of redemption in certain properties mortgaged by him to others under a *bona fide* belief that he had to include only that property which was in his actual physical possession, it was held that the omission was not wilful and the debtor was not guilty of an offence under S. 43, P. I. A., (1907) (2). In a Bombay case, under the Act III of 1907, a railway employee drew from the railway company a certain sum which was his provident fund after the order of adjudication and he, instead of paying it to the receiver, paid it to his wife. It was held that the sum did not vest in the receiver and that the accused could not be held guilty of a fraudulent act within the meaning of section 43 (2) of the Act (3). A person at some time had a certain amount with the bank. He afterwards withdrew a part of it and deposited Rs. 5,000 in the bank in the name of his wife. Subsequently the wife brought a suit to recover the amount against the director and the suit was compromised. What happened to the money afterwards was unknown. The person filed an insolvency petition 19 months afterwards and when he filed the schedule he did not mention the amount of Rs 5,000 involved in the suit against the bank by his wife. It was held that the husband could not be convicted under section 69, it being doubtful whether the amount was in existence at all and whether it really belonged to the insolvent (4).

Where the insolvent has been proved to have received a certain sum of money within 17 days after his adjudication, the court may, under section 114 of the Evidence Act, presume that the source of the trade which brought those sums into the insolvent's hands consisted of undisclosed assets in his possession at the time of the adjudication and a conviction based on such presumption is not bad in law (5). The debtor is not liable under section 22 for failure to comply with processes of prohibitions and injunctions issued by an insolvency court on a creditor's petition, at least until he has due notice of the same under section 19 (3) (6).

Clause (b).—Fraudulent intent necessary.—The expression “fraudulently with intent to conceal the state of his affairs or to defeat

(1) See *Karim Bakhsh v. Misri Lal*, 1885, 7 All. 235 and *Sukrit Narain Lal v. Raghunath Sahai*, 1885, 7 All. 445. (Both cases are on the Insolvency Chapter of the Code of Civil Procedure, 1882).

(2) *Wadhawa Chand v. Emperor*, 44 I. C. 128 : A. I. R. 1918 Lah. 247 (2).

(3) *Nagin Das Bhukhan Das v. Ghela Bhai Gulabdas*, 44 Bom. 673 : 56 I. C. 450 : A. I. R. 1920 Bom. 58 (2).

(4) *Haripada v. Emperor*, A. I. R. 1937 Cal. 234.

(5) *Ram Chandra Naidu v. Emperor*, 1931 M. W. N. 1312.

(6) *S. A. Santiago v. Emperor*, A. I. R. 1936 Nag. 235.

- S. 69.** the objects of this Act" governs the rest of the clause. That is, for the acts described in (i) to (iii) of clause (b) to be punishable, it is necessary to show that they were done by the insolvent with a fraudulent intention to conceal the state of his affairs or to defeat the objects of this Act.

Clause (b) (i).—Withholding or preventing production of books.

—A debtor cannot be convicted for the offence of withholding books and documents, unless it is proved that the books exist (1). The offence of withholding documents may be complete even if the official assignee or receiver subsequently comes into possession thereof, *i. e.*, after a search in the debtor's house (2). The section applies not only to cases of destruction of an insolvent's books of account before they are produced before the official assignee but also to cases of destruction in the official assignee's office after the latter has taken possession of the documents, as removal of a book or a document is a mode of preventing its production within the meaning of this section (3).

Clause (b) (iii).—Making of false entries, etc.—Where there are more than one partners and it is sought to charge one of them with an offence under the clause, it is necessary to prove that he was the person actually responsible for keeping such books and that he omitted to make entries therein. In the absence of evidence as to who, in fact, kept the books, what actual system was adopted of making entries and who was actually responsible, whether individually or collectively, according to the ordinary course of business, the conviction cannot stand (4). Under S. 158, B. A. of 1914, a person, who, having been engaged in any trade or business during any period within the two years immediately preceding the date of the presentation of a bankruptcy petition, has not kept proper books of account throughout that period is liable to be punished. And sub-section (3) of that section prescribes that, for the purposes of that section, a person shall be deemed not to have kept proper books of account, if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and where the trade or business involved dealings in goods, statements of annual stocktakings, and (except in the case of goods sold by way of retail trade to the actual consumer) accounts of all goods sold and purchased showing the buyers and sellers thereof to be identified. Omission to keep books of account, is, in India, a ground for refusing an absolute order of discharge (*vide* section 42 (1) (b)); but it is not an offence under section 69. Where books are in fact kept, and they are false or contain false entries, or they have been wilfully altered or falsified, the debtor might be punished under section 69. The omission seems to be accidental, particularly so when the mode of keeping books of account and the nature of entries therein have been sought to be punished under the section.

Clause (c).—Offences described in clause (c) require a different intent than those specified in clause (b). The offences described in

(1) *Lucas v. Official Assignee of Bengal*, 1919, 24 C. W. N. 418; 56 I. C. 577; A. I. R. 1920 Cal. 624 (case under sections 53 and 54, P-t. I. A.).

(2) *Joseph Perry v. Official Assignee of Calcutta*, 1920, 47 Cal. 254, 259; 56 I. C. 778; A. I. R. 1920 Cal. 941.

(3) *Joseph Perry v. Official Assignee of Calcutta* *supra*.

(4) *Ganga Prasad v. Madhuri Saran*, 100 I. C. 550; A. I. R. 1927 All 352.

clauses (c) (i) and (ii) must be proved to have been committed with a fraudulent intention (i) either to diminish the sum to be divided among his creditors or (ii) to give an undue preference to any of his creditors. Clause (b) is intended to punish suppression of real evidence or the creation of false evidence. Clause (c) is intended to guard the interests of the creditors by punishing the debtor's attempt to reduce or diminish the assets available for distribution or to interfere with the equal distribution of assets amongst the creditors themselves **S. 69.**

Clause (c) (i).—The debt referred to in the clause is a debt which was contracted before the order of adjudication and not to one incurred after that order (1).

Clause (c) (ii)—The words “any part of the property of any kind whatsoever” are to be read not only with the words “charged, mortgaged or concealed” but also with the words “made away with” in the clause. The expression ‘making away with’ though in ordinary language applies to movable property only, applies here to immovable property as well. A case of gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under section 69 (c) (ii), as a case of charge or mortgage (2). Where an insolvent takes the official assignee or receiver to the place where his goods are stored and points out the goods to him, and the goods subsequently disappear, the presumption is that the insolvent has made away with the goods and he is liable to be convicted, unless he gives a satisfactory explanation (3). In the exercise of discretion under section 69 (c) (ii), a proper sense of proportion between the value of property alleged to have been concealed and that of the indebtedness of the insolvent is to be exercised by the judge in directing the prosecution. Where, therefore, the value of the property was negligible as compared with the liabilities of the insolvent the order of the insolvency court directing prosecution was set aside (4).

Offences under the Indian Penal Code.—Section 69 deals with those offences only which are committed by the insolvent. There are certain other offences which may be committed not only by a debtor who is adjudged insolvent, but also by any other person. Those offences are defined in sections 421 to 424 of the Indian Penal Code. The enactment of special bankruptcy offences in the Insolvency Acts does not mean that the insolvent cannot be prosecuted under the general law. He may be prosecuted under those sections (5).

Appeal.—Under the Act III of 1907, as well as under the Act V of 1920, before it was amended by the Act IX of 1926, the insolvency court itself could try an offence under S. 43, sub-section (2), P. I. A.,

(1) *Zibal v. Laxman*, 27 N. L. R. 304 : 134 I. C. 861 : A. I. R. 1932 Nag. 17.

(2) *Harparshad v. Darghai Lal*, A. I. R. 1932 Oudh. 61 : 135 I. C. 893.

(3) *Qasim Ali v. Emperor*, 1921, 43 All. 406 : 64 I. C. 37 : A. I. R. 1921 All. 87.

(4) *Janki Das Marwari v. Mungilal Bajrang Lal*, A. I. R. 1933 Pat. 126 : 12 Pat. 18 : 144 I. C. 179.

(5) *Sigubalah v. Ramasamiah*, 42 I. C. 608 : A. I. R. 1918 Mad. 460 (2).

S. 69. 1907, and S. 69, P. I. A., 1920, respectively. Accordingly it was provided by section 43, sub-section (2) that an appeal from a conviction and sentence made by the district court under section 43, sub-section (2) lay to the High Court by any person aggrieved by such an order. If the order under section 43, sub-section (2) was made by a court subordinate to the district court, an appeal lay to the district court by a person aggrieved by such an order. Under the Act V of 1920, there was an entry in column 2 of schedule 1, to the following effect, "69. Conviction and sentence of debtor for an offence under this section." The right of appeal given under the Act V of 1920 from an order under section 69 (corresponding to section 43, sub-section (2)), passed by a district court otherwise than on an appeal was more restricted because the appeal was confined only to an order of conviction and sentence and to no other kind of order. If the order was made by a court subordinate to the district court, an appeal lay to the district court. The appeal was not restricted to a particular kind of order only under the section. The entry in Schedule 1 of the Act V of 1920 was repealed by section 2 of the Repealing Act XII of 1927, in pursuance of the amendment made in section 70 by the Act of 1926, which had made the entry redundant and meaningless. Under the Act, as it now stands, no question of an appeal from conviction or sentence arises; the right of appeal is now governed by the Code of Criminal Procedure.

Under the Act III of 1907 and the Act of 1920, before 1926, the appeal could be made only by a person aggrieved, and by no other person. Where the debtor was convicted and sentenced, it is clear that he was certainly an aggrieved person. Where a prosecution was ordered and an inquiry instituted by the insolvency court under section 69 or 43 (2), the insolvent debtor was an aggrieved person and he could challenge in appeal the correctness of the order directing prosecution or inquiry (1). In the Act III of 1907, as well as the Act V of 1920, before and after the amendments of 1926 and 1927, there is no express provision as to who has a right to hold the enquiry for taking criminal action against the debtor. There can be no doubt that the court can take action *suo motu* under the present Act and it had the same power under the Act III of 1907. In practice, however, it is very often a creditor or the receiver who moves the court by an application. If the application is granted, the creditor or receiver has no grievance and there is no question of appeal. If the application is inquired into by the insolvency court for the purpose of determining as to whether a prosecution is desirable and it comes to the conclusion that there is no *prima facie* case against the debtor and then dismisses the application, the order of the court is an order under section 69 or section 43, sub-section (2), as the case may be. Is the creditor or receiver a person aggrieved by such an order? If so, he has a right of appeal. If not, then the court's order is final and nobody can appeal against. The creditor's right to appeal in such circumstances was considered under the Act III of 1907 and has been considered even under the Act V of 1920 in many cases, and in all of them

(1) Harchand Rai v. Khair-ud-Din, A. I. R. 1936 Lah. 871.

the right of the creditor was negatived (1). No appeal lies from an interlocutory order calling upon the insolvent to show cause why an order should not be made against him under S 43 (2), P. I. A., 1907 (2). No appeal lies from an order refusing to convict a debtor for an offence under section 69 (3). A receiver merely represents the general body of creditors and if his application for taking criminal action is refused by the court, he too has no right of appeal (4). In a Madras case, it has, however, been held that a creditor is entitled to have his petition under section 43 inquired into and if the court refuses to consider and inquire into the application, he would be a person aggrieved by the order within the meaning of the term in section 46, P. I. A., 1907, and therefore entitled to appeal (5). It is submitted that this view is incorrect. In an earlier Madras case, it was remarked that a creditor has no right to set the court in motion, although in practice the court may avail itself of any assistance which the creditor may render to it by bringing to its notice the delinquency of the debtor (6); or, as remarked in a Lahore case, an order refusing an application by a creditor to take action against the insolvent under section 43, P. I. A., is not appealable because the application is not one which the Insolvency Act entitles a creditor to make and if such an application is refused, it cannot be said that the creditor is deprived of any right which he could ask from the court (7).

70. Were the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiry into any offence referred to in section 69 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the

(1) *Iyappa Mainer v. Manicka Asari*, 40 Mad. 630 : A. I. R. 1915 Mad. 1066; *Ladu Ram v. Mahabir Prasad*, A. I. R. 1917 All. 280 : 37 I. C. 996 : 39 All. 171; *James Finlay & Co. v. Amanal-Ladhamal*, 118 I. C. 198 : A. I. R. 1930 Sind (2); *Vir Chand v. Bulaki Das*, 55 I. C. 717 : A. I. R. 1920 Nag. 25; *Digendra Chandra v. Ramani Mohan Goswami*, 22 C. W. N. 953 : A. I. R. 1919 Cal. 900 : 48 I. C. 333; *Teunon, J. ; Gujar Shah v. Barkat Ali Shah*, 1 Lah. 213 : 56 I. C. 744 : A. I. R. 1920 Lah. 323; *Palaniappa Chetty v. Subramania Chetty*, 54 I. C. 740 : A. I. R. 1920 Mad. 400; *Dula Singh v. Appar Singh*, 42 I. C. 287 : A. I. R. 1917 Lah. 282 (1); *Chidambaram Chetty v. Nagappa Chetty*, 38 Mad. 15; *Karuthan Chettiar v. Raman Chetty*, 79 I. C. 340 : A. I. R. 1924 Mad. 185; *Pursingh v. Munshi Alla Dad Khan*, 141 I. C. 350 : A. I. R. 1933 Nag. 9; *Alladin v. Firm Kirpa Ram-Sunder Das*, A. I. R. 1937 Lah. 432; *Maung Tuntin v. K. P. A. R. Chettyar Firm*, A. I. R. 1937 Rang. 472.

(2) *Manmohan Roy v. Hemanta Kumar Mookerjee*, 34 I. C. 771 : A. I. R. 1916 Cal. 174.

(3) *Jita Mal v. Madan Lall*, 133 I. C. 907.

(4) *Bhagwant Kishore v. Sanwal Das*, 61 I. C. 802 : A. I. R. 1921 All. 246.

(5) *Karuthan Chettiar v. Raman Chetty*, 79 I. C. 340 : A. I. R. 1924 Mad. 185.

(6) *Palaniappa Chetty v. Subramania Chetty*, 54 I. C. 740 : A. I. R. 1920 Mad. 400.

(7) *Gujar Shah v. Barkat Ali Shah*, 1 Lah. 213 : 56 I. C. 744 : A. I. R. 1920 Lah. 323.

- S. 70.** offence in writing to a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.

History.—In the Act III of 1907 there was only one section, namely, section 43 (2), which dealt with offences in the course of insolvency proceedings. It is already quoted under section 69. In practice the wording of the section was found to be vague and unworkable; and it was considered necessary to make it more explicit. Accordingly it was replaced by section 70 of the Act of 1920. The section, as it originally stood at the time of the enactment of the Act V of 1921, ran as follows :—

“(1) Where the Court is satisfied that there is ground for enquiry into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of a summons, calling on him to show cause why a charge or charges should not be framed against him.

(2) The notice shall set forth the substance of the offence, and any number of offences may be set forth in the same notice.

(3) At the hearing of such notice and of any charge framed in pursuance thereof, the Court shall, so far as may be, follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898, and nothing in Chapter XXIII of the said Code relating to trial before High Courts and Courts of Sessions shall be applicable to such trial.

(4) Any number of offences under this section may be charged under this section may be charged at the same time :

Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding.

(5) The Court may, instead of inquiring into an offence under section 69 make a complaint thereof in writing to the nearest magistrate of the first class having jurisdiction and such magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898 :

Provided that it shall not be necessary to examine the complainant.

Then in 1920, the Government of India appointed the Civil Justice Committee, which, in this respect, made the following recommendation :—

“As regards the criminal offences created by the Act of 1920, these are in substance the same as those created by the Presidency Act of 1909. In practice the procedure whereby the insolvency judge takes upon himself the duties of a magistrate, trying a warrant case, has in the past been highly unsatisfactory. The prosecution is in the hands of the Official Assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the Court. By the Act of 1920, however, section 70, sub-section (5), the Insolvency Court instead of proceeding

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itself to try the case, as a warrant case tried by a magistrate, may make a complaint to the nearest first class magistrate, who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency-towns Insolvency Act by an amendment of section 104. We think, moreover, that the necessity for notice to the insolvent might well be discarded altogether, and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy Court, without consulting the bankrupt on the subject; the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of arrangement would seem to be that the receiver or, if he refuses, a creditor should be given power to apply to the Court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried on by the Local Government through such officer as it may appoint for the purpose. In England it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution; he can abandon it if he thinks on investigation that the case cannot be proved; the insolvent is only concerned with the proceedings as any ordinary accused is concerned with criminal proceedings against him—namely to defend them when they have been instituted" (1).

Effect was given to this recommendation, and section 70 of the Act was amended by Act 9 of 1926. By that Act the first three clauses of section 70 of the Act of 1920 were repealed and the present section was substituted. The amendment, made in 1926, however, left the last two clauses, that is, 4 and 5 of section 70 and the last sentence in section 69 of the Act of 1920, undisturbed. These clauses, by the amendment made in 1926, had become redundant. The omission was subsequently discovered and Acts X and XII of 1927 were passed, repealing certain words in the Amending Act IX of 1926, and section 69 of the Act of 1920. The effect of it is that section 70 stands now as it was enacted by the Act of 1926 minus clauses 4 and 5 of section 70 of 1920. Again, Act XII of 1927 was repealed by the second Schedule to section 3 of Act XVIII of 1928. The effect of it is again, to leave section 70 as it stands.

Analogous law.—In England bankruptcy proceedings under the earlier bankruptcy laws were in the nature of criminal proceedings. By the Bankruptcy Act of 1849, certain offences were made misdemeanours punishable by imprisonment and the bankruptcy court was empowered to direct the assignees to institute, and on their failing to do so, the official assignee to institute, a prosecution for the offence with which the bankrupt was charged (2). Under the Bankruptcy Act, 1861, the next Act, power was given to the bankruptcy court to try the offences which were misdemeanours, or to direct the bankrupt to be indicted or prosecuted in one of the ordinary courts of criminal justice (3). Later on, by the Bankruptcy Act, 1869, the court of bankruptcy was divested of the power to try a bankrupt for any bankruptcy offence, and such offences were to be tried by the ordinary criminal courts. The relevant sections of the Act of 1914, in regard to the procedure to be adopted by the bankruptcy courts in the

(1) Civil Justice Committee report, 1924-25, para 16, page 233.

(2) B. A., 1849, S. 255.

(3) S. 159, Bankruptcy Act, 1861.

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The corresponding section of the Presidency-towns Insolvency Act is section 104. Section 104 was almost in the same terms as section 70 of the Act V of 1920. Both sections 104 and 70 were amended in 1926 in the same manner. The result is that the procedure now under the English Act and both the Indian Acts is almost the same. The English sections are, however, more comprehensive. The Indian sections, more or less, follow the provisions of section 476 of the Code of Criminal Procedure.

Who can move the court.—The section does not expressly provide as to the persons who can move the court. Section 43, sub-section 2 of the Act III of 1907 and the former section 70 of the Act V of 1920 also did not provide as to how and in what manner the court is to be moved. S. 161, B. A., 1914, is, however, clear on the point. Under that section the official receiver or a trustee in bankruptcy may make a report to the bankruptcy court, or any creditor, or a member of the committee of inspection may make a representation to that effect. The representation or report should be in writing supported by proper evidence and be filed with the proceedings (1). It has also been held that the creditor may obtain leave to prosecute under the section and the trustee or any accomplices of the debtor may be included in the order (2). Where a report is made by the official receiver, the court should consider it, and, even if the official receiver does not ask for any order directing a prosecution, should determine that a bankrupt ought to be prosecuted unless it thinks fit to adjourn the application (3). Under the section, it is presumed, that the court may act *suo moto* or on the application of any interested person. Even if it acts on the application of a person it shall be considered to have acted in the matter of its own accord. If an application is made by a creditor or the receiver for the prosecution of the debtor under section 69, and the application is refused by the court, the creditor or the receiver is not an

(1) *Exp. Leonard*, L. R. 19 Eq. 269; *Re Dunn*, 1902, 1 K. B. 107.

(2) *Exp. Evans*, 44 L. T. 762.

(3) *Re Dunn*, 1902, 1 K. B. 107.

aggrieved person and has no right of appeal. We have considered this matter under section 69. If the prosecution is directed by the court either of its own accord or on its being moved by anybody else, the insolvent appears to be an aggrieved person and an appeal, other things being equal, will lie under section 75. It is true that the amendment of 1926 has altogether dispensed with the necessity of notice to the debtor, but it does not indicate that the only remedy of the debtor is to defend the charge in the criminal court only. In England, however, it has been held that a debtor cannot appeal from such an order which is generally made *ex parte* on the application of the trustee (1) nor an accomplice of a debtor so prosecuted can appeal from such order (2).

Notice to the insolvent.—Having regard to the history of the section, a notice to the insolvent is no longer necessary. Under S. 104, P.t. I. A., and S. 70, P. I. A., as they stood before the amendment of 1926, it was held that notice to the insolvent was not only absolutely necessary but also that the notice must have specified the charges against the debtor and that the court could not convict the person for an offence which was not clearly specified therein. Even after the amendment it has been held in a Rangoon case that, though the insolvent is not entitled to take part in the proceedings under these sections, it is desirable that the insolvent should be given an opportunity of explaining to the court the reasons why he contends that the court should not proceed to the extreme limit of making a complaint under S. 104, P.t. I. A., against him in a criminal court (3).

After such preliminary inquiry as it thinks necessary.—In the matter of inquiry the section confers a wide discretion on the court (4). All that the section requires is that before the complaint is filed it shall satisfy itself that an offence under section 69 appears to have been committed by the insolvent and record a finding to that effect. The section does not prescribe the manner in which the judge is to satisfy himself. It has been, therefore, held that the judge should satisfy himself in any way he thinks proper (5). Under section 476 of the Code of Criminal Procedure, it has been held that the holding of a preliminary inquiry is discretionary with the court, though in some cases the discretion might be questioned in appeal or revision (6). It appears doubtful whether the words "preliminary inquiry" in section 70 of the Act necessarily mean a judicial inquiry on sworn evidence (7). Under section 43 of the Act III of 1907, it was the insolvency court itself which was to hold the trial for such an offence and it was considered in many cases as to what evidence was relevant for the purpose of recording a conviction. As to that see commentary under section 69. As the law now stands, it is submitted, that the principles laid down under section 476, Cr. P. C., shall be followed in construing the

(1) *Exp. Marsden*, 2 Ch. D. 786 ;

(2) *Exp. Brown*, 2 Ch. D. 799.

(3) *Burma Dairy Co., Ltd. v. Desai*, A. I. R. 1935 Rang. 324 : 13 Rang. 525 : 158 I. C. 644.

(4) *Harchand Rai v. Khairuddin*, A. I. R. 1936 Lahore 871.

(5) *Jewraj Khariwal v. Doyal Chand*, A. I. R. 1928 Cal. 211 : 55 Cal. 783 : 111 I. C. 372.

(6) *Durpa Narayan Bera v. Bepin Behari Mitter*, 14 C. L. J. 123 : 10 I. C. 66 : 15 C. W. N. 691. For other cases see any commentary on the Criminal Procedure Code.

(7) *Jewraj Khariwal v. Doyal Chand supra*.

S 70. section. The discretion conferred by the section is judicial in its nature and the inquiry should also be conducted in a judicial manner but by it it does not necessarily mean that all the formalities which are observed in a trial should be observed at the stage of a preliminary inquiry as well. For instance, the court at the stage of inquiry may consider the evidence of witnesses already recorded in insolvency proceedings

Principles governing discretion.—Under S. 161, B. A., of 1914, the court has, besides satisfying itself that an offence has been committed, to consider that there is a reasonable probability that the debtor will be convicted and the circumstances are such as to render a prosecution desirable. There it has been held that where there is reasonable evidence to go to a jury of a bankrupt having committed offences within this Act, a prosecution will be directed, and the court will not try the question whether the evidence is sufficient to induce a jury to find guilty, though a prosecution will not be directed on mere suspicion (1). Similar principles have been considered in cases arising under the Indian Acts (2). The same principles have been applied to cases arising under sections 476 and 195 of the Code of Criminal Procedure (3).

Any offence referred to in section 69.—Section 69 defines the bankruptcy offences and section 70 lays down the procedure to be adopted when the bankruptcy court is of opinion that an offence under that section has been committed, and thereupon it directs a prosecution. Besides section 69, section 72 (1) also prescribes an offence when an undischarged insolvent obtains goods on credit. The procedure prescribed by section 70, it appears, applies only when the prosecution, that is ordered, is for any one of the offences under section 69.

May record a finding to that effect.—The fact that the court is satisfied about the commission of an offence by the insolvent should be recorded in the proceedings and it appears that, though not expressly provided, reasons for that opinion should also be recorded. Omission to record a finding or reasons thereof will, however, it is submitted, be a mere irregularity and will not be a ground for interference in the absence of prejudice.

Time for filing the complaint.—It is open to the court at any stage of the proceedings after the adjudication order has been passed, and even after discharge, to exercise the discretion with which it is vested under S. 104, P.-t. I. A., (corresponding to the present section). It is not necessary, and in many cases it is undesirable, that the court should order that a complaint be made under section 104, at the hearing of an application for discharge. Different considerations arise when the court is called upon to decide whether and, if so, upon what terms, an insolvent should be granted his discharge, and when the court should or should not exercise the powers which it possesses under section 104 (1).

(1) *Exp. Stallard*, L. R. 3 Ch. 408; *Exp. Strickland*, 32 L. J. Bank. 12; *Yusuf Abdul Aziz v Blackwood and Blackwood & Co.*, 149 I. C. 1106 (2); A. I. R. 1933 Rang. 253.

(2) *Burma Dairy Co., Ltd., v. Desai supra*; *Lalchand v. Official Assignee, Karachi*, 147 I. C. 136; A. I. R. 1933 Sind 381.

(3) See any commentary on the Code of Criminal Procedure.

(4) *Burma Dairy Co., Ltd., v. D. R. Desai supra*.

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Complaint to be sent to a magistrate having jurisdiction.—The insolvency court has to file the complaint in the court of a magistrate of the first class having jurisdiction for the trial of the offence. The jurisdiction to try the offence should be determined under the Criminal Procedure Code, and is not derived from the Insolvency Act. Thus, where a debtor carried on a trade at Yeotmal and got involved, and his assets were in Amraoti and Yeotmal and he executed a mortgage in favour of the petitioner at Bombay with a view to defeat his creditors, it was held that the court at Yeotmal had jurisdiction to try the offence under sections 179 and 182, Criminal Procedure Code (1). It is a first class magistrate who can, under the Code of Criminal Procedure, pass a sentence of imprisonment for two years. Under section 69, the maximum punishment is imprisonment for a period of one year.

Procedure under the Act III of 1907.—Under the old Act III of 1907 the insolvency court itself tried the insolvency offences and sentenced the accused. There were no provisions prescribing the procedure to be adopted by the insolvency courts in the trial of bankruptcy offences. It was, however, held in cases decided under the old Act that, in so far as an order under section 43 of the Provincial Insolvency Act results in a sentence of imprisonment, the case must be treated as a criminal case, that in all criminal cases it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence, and if in any one of these three points, a substantial defect should appear, it would be a ground for reversing the proceedings (2). In a few other cases, however, such a strict view was not taken and it was held that if the insolvent was informed of the nature of the proceedings, the offence with which he was charged and of its consequence, the essentials of a criminal trial were complied with and all the formalities of a criminal trial were not necessary (3).

Following the general principles stated above that the procedure for the trial of an insolvency offence should be substantially that of a criminal court, it was held that evidence should be recorded regularly after charging the accused of the offence. Thus where the conviction was based on the evidence given on behalf of the creditors when they were opposing his application for adjudication of insolvency (4), or based on the report of the receiver (5), it was held illegal.

Under the present Act the insolvency offences are triable by the ordinary criminal courts and they are to follow the procedure laid down in the Code of Criminal Procedure. It would be an assistance to judges dealing with offences under the Insolvency Act to frame the charges strictly in the language of the section which defines the offences together with the particulars of the conduct of the insolvent relied upon to establish the

(1) *Trikamji v. Emperor*, 145 I. C. 550 : A. I. R. 1933 Nag. 33.

(2) *Harihar Singh v. Maheshwar Parsad*, A. I. R. 1915 Cal. 117 : 27 I. C. 199 ; *Amiruddi Karikar v. Jadab Karikar*, 19 C. L. J. 430 : 19 I. C. 920 ; *Nawab v. Topan Ram*, 110 P. R. 1916 : 35 I. C. 494 : A. I. R. 1916 Lah. 182 (Case-law discussed) ; *Rash Behari Roy v. Bhugwan Chander Roy*, 17 Cal. 209.

(3) *Ganapathy v. Chinna Ji*, 45 I. C. 675 : A. I. R. 1918 Nag. 214 ; *Mahomed Hasan Ullah v. Emperor*, 38 I. C. 969 : A. I. R. 1917 All. 354.

(4) *Nathumal v. District Judge of Benares*, 6 I. C. 870 : 32 All. 547 ; *Patandin v. Emperor*, 39 I. C. 986 : A. I. R. 1917 Od. 207.

(5) *Harihar Singh v. Maheshwar supra* ; *Nand Kishore v. Suraj Mal*, 37 All. 429 : 29 I. C. 998 : A. I. R. 1915 All. 308.

- S 71, charges just as it is done in a formal charge of an offence (1) Similarly
72. the criminal court trying insolvency offences should observe S 233, Cr. P. C. Thus it has been held that the joinder of three distinct charges, each under section 193 (a) (ii) and (b) (i), P-t I. A., 1909, is illegal (2)

Miscellaneous—Where proceedings were begun against an insolvent under section 25 of the Punjab Laws Act, IV of 1872, under which certain acts of the insolvent rendered him liable to detention in the civil prison and where, pending proceedings, the Punjab Laws Act was repealed by the Provincial Insolvency Act, III of 1907, and section 25 of the former Act was substituted by section 43 of the later Act, under which the same acts of the insolvent rendered him liable to simple imprisonment in a criminal jail, it was held that the proceedings should be continued and punishment should be inflicted, if necessary, under the old Act as if the new Act had not been passed (3).

71. Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved

Criminal liability after discharge or composition

History.—The section is new. It was thought desirable to make it clear that a dishonest insolvent, who has been guilty of an offence under the Act, can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted (4)

Analogous law.—The section corresponds to S. 105, P-t. I. A., 1909, S. 167, B. A., 1883, and S 162, B. A., 1914. S. 105, P-t. I. A., 1909, covers the offence under section 102 of that Act as well (obtaining credit by an undischarged insolvent).

Scope—Does the section apply to a prosecution under section 72? See commentary under section 72.

72. (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

Undischarged insolvent obtaining credit.

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1), the Court, after making

(1) *Ganga Parsad v. Madhuri Saran*, 100 I. C. 550: A. I. R. 1927 All. 352.

(2) *Khim Chand Mehta v. Emperor*, A. I. R. 1934 Bom. 303.

(3) *Ganpat Bai v. Malla Mal*, 11 P. R. 1910: 5 I. C. 804.

(4) Statement of Objects and Reasons, Gazette of India, dated 7th September, 1918.

any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate ; and may bind over any person to appear and give evidence on such trial. S. 72.

History.—The section reproduces section 53 of the Act III of 1907.

Analogous law.—S. 102, P-t. I. A. 1909, exactly corresponds to sub-section (1) of the present section. It does not contain any provision corresponding to sub-section (2). Its section 104, corresponding to section 70 of the present Act, also expressly refers to offences prescribed under S. 103, P-t. I. A. only, and not that under section 102. The combined effect of reading Ss. 102, 103 and 104, P-t. I. A., 1909, appears to be that no procedure is prescribed for the insolvency court when it intends to prosecute a person for obtaining credit. Section 155, B. A. of 1914 runs as follows :—

“Where an undischarged bankrupt—

(a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt ; or

(b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt ;

he shall be guilty of a misdemeanour.”

The maximum punishment is now prescribed by section 164 of that Act to be two years' imprisonment, or where summarily prosecuted six months, with or without hard labour. Under the Act of 1913, the amount in (a) was twenty pounds.

Sub-section (1) ; conditions of applicability.—In order to apply the sub-section and to find the insolvent guilty of the offence of obtaining credit, the conditions which should be satisfied are—

(i) Is the accused an undischarged insolvent ?

(ii) Did he obtain credit to the extent of Rs. 50 or upwards ? and

and (iii) Did he in fact inform the person from whom he obtained credit that he was an undischarged insolvent (1).

We proceed to consider all these conditions in the order mentioned above.

Undischarged insolvent.—The insolvent should have been adjudicated insolvent and remained undischarged under the Provincial Insolvency Act. A person who was adjudicated insolvent under the Presidency-towns Insolvency Act or any other Act cannot be prosecuted under section 72. Similarly a person who has been adjudicated under the Provincial Insolvency Act cannot be prosecuted under section 102 of the Presidency-towns Insolvency Act (corresponding to section 70 of the present Act (2). The

(1) R. V. Duke of Leinster, 1924, 1 K. B. 311 ; Utma Mallick Visheshan Das, in the matter of, 107 I. C. 442 : 23 S. L. R. 63 : A. I. R. 1928 Sind. 114.

(2) Ashutosh Ganguly v. E. L. Watson, A. I. R. 1927 Cal. 149 : 53 Cal. 929 : 98 I. C. 116.

- S. 72.** question whether the insolvent is still undischarged is to be determined by the provisions of the Act under which he was adjudged insolvent. Under the Insolvency Chapter of the old Civil Procedure Code, 1882, an insolvent was in certain cases discharged immediately upon the granting of the application for adjudication. A person so discharged has been held to be a discharged insolvent under the U. P. Municipalities Act, 1916, (1). Section 41 contemplates discharge in more than one form. It is submitted that an insolvent will not be considered to be undischarged simply by reason of the fact that conditions are attached to the order of discharge by the insolvency court under section 41, sub-section (2) (c). But if the discharge is suspended by the court for a specified time, the insolvent will remain undischarged till the expiry of that period.

Obtaining credit.—What the section requires is that the insolvent should have obtained credit. The word 'credit' is defined in the short Oxford Dictionary as meaning "belief, confidence, trust, faith" and also "confidence in a buyer's ability and intention to pay at some future time for goods entrusted to him without present payment"; to give credit, therefore, is to trust in a person's ability and intention to pay and to obtain credit is to tell a person in fact that he is able and intends to pay. Thus it has been held that a "Jangad" transaction is a transaction which is generally called a "sale or return transaction," and obtaining goods on jangad by an undischarged insolvent is obtaining credit within the meaning of this section (2). If credit is in fact obtained, there need be no agreement to give it (3). Credit may in fact be obtained even though security for the debt is given (4). In a case under the Presidency-towns Insolvency Act, it has been held that obtaining a loan on a mortgage of immovable property which has been acquired by the insolvent after adjudication is not obtaining credit within section 102 of that Act (5). It is not necessary to show an intent to defraud (6). The offence is committed where the bankrupt keeps goods to the statutory extent though the order was for a less amount (7).

Again, it is to be noted that it is the very person who obtains credit who is liable to be prosecuted; and it is immaterial if he obtains such credit solely on his behalf or on behalf of himself and another person or if he joins another person and both together obtain such credit (8). In the English section the words "either alone or jointly with any other person" occur. These words are omitted from the present section but the omission does not appear to make any difference between the scope of the two sections. If there is any difference at all, the omission is intended to expand the scope of the present section and not to limit it in any way (9).

(1) *L. Parmeshwari Dass v. Municipal Board, Baireilly*, A. I. R. 1932 All. 58 (2) : 133 I. C. 909.

(2) *Pheroze Shah Manerji Gandhi v. Emperor*, A. I. R. 1934 Bom. 360: 58 Bom. 646 : 152 I. C. 706. Case under section 102, P-t. I. A.

(3) *Reg. v. Peters*, 16 Q. B. D. 636.

(4) *R. v. Fryer*, 7 Cr. App. Rep. 183.

(5) *Prem Chand Mullick v. Nilmonidas*, 61 Cal. 231 : 151 I. C. 137 : A. I. R. 1934 Cal. 529.

(6) *R. v. Dyson*, 1894, 2 Q. B. 176.

(7) *R. v. Juby*, 55 L. T. 788.

(8) *Utma Mallick Visheshandas*, in the matter of, 107 I. C. 442 : 23 S. L. R. 63 : A. I. R. 1928 Sind 114.

(9) *Utma Mallick Visheshandas supra*.

Without informing such person that he is an undischarged insolvent.—The obligation imposed by the section on an undischarged bankrupt to disclose his position to the person from whom he seeks credit is absolute. It is no defence that he took steps to have such information conveyed, or that he had reasonable grounds to believe that it had been conveyed, if in fact it had not. Thus where a bankrupt obtained goods on credit through an agent, and he neglected to inform the sellers that his principal was an undischarged bankrupt, although he had been directed by the bankrupt to do so, the Court of Criminal Appeal held that the accused was properly convicted under this section notwithstanding that, when the goods were purchased, he believed on reasonable grounds that the agent had carried out his instructions (1).

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Prosecution under the section cannot be ordered after discharge.

—After an insolvent has been discharged the insolvency court cannot proceed against him under section 72, even though an offence was committed within the meaning of that section before the order of discharge, because in such a case the person from whom the insolvent has obtained credit during the insolvency can proceed against him in the ordinary course of law. Section 71 also does not apply because it specifies that its scope is confined only to offences mentioned in section 69; and obtaining credit by an undischarged insolvent does not fall under section 69 (c) (2). The law under the Presidency-towns Insolvency Act is different, as S. 105, P.-t. I. A. (corresponding to S. 71, P. I. A., 1920), is expressly made applicable to S. 102, P.-t. I. A. (corresponding to S. 72, P. I. A., 1920). The omission in the Provincial Insolvency Act in making section 71 applicable to a case under section 72 appears to be accidental. As appears from the Statement of Objects and Reasons quoted in a previous paragraph the legislature intended to apply section 71 to all offences under the Act. The mistake can, however, be rectified by the legislature only. In this connection attention may also be drawn to S. 162, B. A., 1914, (corresponding to S. 71, P. I. A., 1914), which applies to S. 155, B. A., 1914 (corresponding to S. 72, P. I. A., 1920).

Sub-section (2).—Sub-section (2) prescribes the procedure which the court is to adopt, when it is of opinion that an offence has been committed under the section; just as section 70 prescribes the procedure for the insolvency court in the case of an offence under section 69. It is the same as section 70, except that under the sub-section the court has the power of sending the accused in custody or taking sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence in such trial. The difference is not material because in a case under section 69, the same powers will be exercised by the criminal court.

The question has, however, arisen as to whether the sub-section prescribes the only mode in which a criminal court can take cognisance of an offence under section 72, sub-section (1). In other words, the question which has arisen is: Is it competent to a person other than the insolvency court to lodge a complaint against the insolvent for an offence under section 72, sub-section (1)? The matter was considered at length in a Calcutta case. The matter at first came before a Division Bench and on a difference between the members composing it, the matter was referred to a third

(1) *R. v. Duke of Leinster*, 1924, 1 K. B. 311.

(2) *Zibal v. Laxman*, 134 I. C. 861; A. I. R. 132 Nag. 17; *W. D. Jordan v. Mahadeolal*, A. I. R. 1934 Cal. 764 (1); 61 Cal. 605; 151 I. C. 1026.

S. 73. judge. The opinion of the majority was that a person accused of an offence under the 1st sub section may be proceeded against only by the methods laid down in sub-section (2), on the ground that both the clauses should be read together and the general rule of interpretation in such cases is that if a statute creates a new duty or imposes a new liability and prescribes a specific remedy in case of neglect to perform that duty or discharge that liability, no remedy can be taken but the particular remedy prescribed by the statute (1).

Appeal—The only person who can appeal under section 72 is the debtor himself in a case where the prosecution has been ordered (2). A creditor, who has made an application to the insolvency court for an order of prosecution under the section and whose application has been refused or rejected, has no right of appeal. For that see commentary under section 70. The section does not lay down any rules regulating the course of appeals from a conviction under the section. The law was the same under the Act III of 1907. The appeals from a conviction are governed by the Code of Criminal Procedure.

73. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

Disqualifications
of insolvent.

- (a) being appointed or acting as a Magistrate ;
- (b) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached ;
and
- (c) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

- (a) the order of adjudication is annulled under section 35, or
- (b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

(3) The Court may grant or refuse such certificate as it thinks fit, but any order of refusal shall be subject to appeal.

(1) *Ashutosh Ganguly v. E. L. Watson*, A. I. R. 1927 Cal. 149 : 93 I. C. 116 : 55 Cal. 929.

(2) *Bur Singh v. Munshi Aladad Khan*, 28 N. L. R. 286 : A. I. R. 1933 Nag 9 : 141 I. C. 350.

History.—This section is new. Under the Act III of 1907, an undischarged insolvent was under no civil disabilities. The reasons for the enactment of this section have been thus explained :— S. 73.

“Under the Indian law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person of this position, but it appears desirable that the sense of the community should be stimulated by providing certain statutory disqualification in addition to those already imposed, e g., by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in section 32 of the Bankruptcy Act, 1883” (1). Again, “we propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities such as incapacity to hold certain offices. That is if I may say, fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of the others” (2).

Analogous law.—In the Presidency-towns Insolvency Act, 1909, as it stood before 1920, there was no provision imposing disabilities on an insolvent. When the Act V of 1920 was passed, the Presidency-towns Insolvency (Amendment) Act, 1920, No. 2 of 1920, was also passed, and by its section 2, section 103 (3), Presidency-towns Insolvency Act was enacted. It is in almost the same terms as the present section. The Bankruptcy Act of 1914 does not impose any disqualification, but only gives the power to grant certificates of removal under sub section (4) of section 26, B. A., of 1914, as amended by the Bankruptcy (Amendment) Act, 1926. It is provided therein that with a view to removing any statutory disqualification on account of bankruptcy, which is removed if the bankrupt obtains from the court a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part, the court may, if it thinks fit, grant such a certificate, but a refusal to grant such a certificate shall be subject to appeal. There are, however, certain unrepealed sections of earlier bankruptcy Acts relating to disqualifications of a bankrupt which are still in force. They are :—

(i) Sections 6, 7 and 8 of the Bankruptcy Disqualification Act, 1871 (34 and 35 vict. c. 50). It provides that an insolvent shall be disqualified from sitting and voting in the House of Lords and the procedure relating thereto.

(ii) Sections 32, 33 and 34, Bankruptcy Act, 1883. Section 32 sub-section (1) disqualifies an insolvent from sitting in the House of Lords and the House of Commons, or from being appointed or from acting as a justice of the peace, alderman or councilor or member of a sanitary authority, or a school board, highway board, burial board or select vestry, etc. Section 32, sub-section (2) provides for the removal of disqualifications and for the grant of a certificate in cases where the bankruptcy arose by misfortune without any misconduct on the part of the insolvent, by the insolvency court. The only difference between the English and the Indian section is that an annulment of adjudication of bankruptcy, for whatever reasons and in whatever circumstances, operates as a removal of disqualifications under the English section but under the Indian section it so operates only when the order is under section 35, P. I. A., 1920. Sections 33 and 34 provide for the vacating of seats in the House of

(1) Notes on clauses,

(2) Speech by Sir George Lowndes in Council.

S. 73. Commons or municipal or other offices by a person who while holding such office, becomes an insolvent.

(iii) Section 9 Bankruptcy Act, 1890. It is an amending Act of the Bankruptcy Act of 1883. It is provided that no disqualification arising by virtue of section 32, Act of 1883, shall exceed a period of five years from the date of discharge which may have been, or may hereafter be, granted under and by virtue of the Act of 1883 or of the Bankruptcy Act, 1890. No similar provision exists in Indian Acts. It is desirable that the disqualifications of the insolvent should be limited in their operation to a period of time only.

Retrospective effect of the section—This section does not apply retrospectively to disqualify persons. Thus it has been held that a person who was adjudged insolvent before the passing of the Act of 1883, was not disqualified by reason of provisions contained in section 32 of the Bankruptcy Act, 1883 (1). Similarly it has been held that a person who was discharged, according to the law under the old Civil Procedure Code, must be considered to be a discharged insolvent, even though his case might not come under the Act III of 1907, for the purposes of discharge (2).

Removal of disqualifications—The disqualifications imposed by the first sub-section are removed when the order of adjudication is annulled under section 35. It appears that if it is annulled under any other section, e.g., section 39, it shall not have that effect.

The second case when the disqualifications are removed is when an insolvent obtains a certificate from the insolvency court at the time of his discharge that his insolvency was caused by or arose from misfortune without any misconduct on his part. The power of the court to grant the certificate is a discretionary one. The burden of proof that the insolvency was caused by misfortune without any misconduct lies on the insolvent. Misfortune is "an adverse event not immediately depending on the actions or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculation in reference to the interests either of himself or of others" (3). A man reduced to poverty by an act of God destroying his property suffers from misfortune without any misconduct on his part. A man, who gambles so much that if he is unsuccessful he cannot pay his creditors, does not owe his situation to misfortune without misconduct, though he would probably say that he had been unfortunate in his play. Similarly if a man institutes a suit for divorce against his wife and a co-respondent on the ground of adultery, but the suit is dismissed with costs which he is unable to pay and he is adjudged insolvent on the petition of the co-respondent, the insolvency cannot be said to have been caused by misfortune, though there may be no misconduct on his part, and he is not entitled to a certificate. Further, misfortune must be the sole cause of the insolvency. Where the insolvency is not the sole cause but it is due partly to misfortune and partly to misconduct it cannot come within

(1) *In Re School Board Election for the Parish of Pulborough*, 1894 : 1 Q. B. 725 (737).

(2) *Parmeshwari Das v. Municipal Board, Bareilly*, A. I. R. 1932 All. 58 (2) : 133 L. C. 909.

(3) *Re Lord Colin Campbell*, 1833, 20 Q. B. D. 816, 822, per Fry, L. J.

the exemption (1). If a man publishes libel against another (2), or S 74.
slanders another (3), it is not misfortune, and if he is unable to pay the
costs of the action brought against him and insolvency follows, he is not
entitled to a discharge.

Appeal.—The section gives a right of appeal from an order of
refusal to grant the certificate. No appeal, however, lies from an order
granting the certificate.

Other disqualifications of an insolvent.—An insolvent, besides the
disqualifications imposed by the Provincial Insolvency Act, may be
disqualified from any other acts by other Acts. Thus it has been held that
the High Court in its disciplinary jurisdiction has full power to suspend
the sanad of a pleader who has been adjudicated an insolvent until he
obtains a discharge, if, in the circumstances of the case, it considers that
the insolvency coupled with surrounding circumstances supplies a reason-
able case for such suspension (4). It is provided by section 119, P-t.
I. A., 1909, that where an insolvent is a trustee within the Indian Trustee
Act, 1866, section 35 of that Act shall have effect so as to authorise the
appointment of another trustee in substitution for the insolvent (whether
voluntarily resigning or not), if it appears expedient to do so, and all
provisions of that Act and of any other Act relative thereto, shall have
effect accordingly. Various Municipal Acts and Acts of the legislature
have also imposed disabilities on insolvents for performing certain duties
or for holding certain offices or for exercising certain powers as the power
of voting, etc.

PART V.

SUMMARY ADMINISTRATION.

74. When a petition is presented by or against
a debtor, if the Court is satisfied by
Summary adminis- affidavit or otherwise that the pro-
tration. perty of the debtor is not likely to
exceed in value five hundred rupees the Court may
make an order that the debtor's estate be administered
in a summary manner, and thereupon the provisions of
this Act shall be subject to the following modifications,
namely :—

- (i) unless the Court otherwise directs, no notice
required under this Act shall be published
in the local official Gazette ;
- (ii) on the admission of a petition by a debtor,
the property of the debtor shall vest in the
Court as a receiver ;

(1) *Re Lord Colin Campbell*, (1888) 20 Q. B. D. 816.

(2) *Re Burgess*, 1887, 4 Mor. 186.

(3) *Re Thomson*, 1918, 19 B. & C. R. 150.

(4) *The Government Pleader v. D. Narain Deshpande*, 52 Bom. 559 ;
A. I. R. 1928 Bom. 385.

S. 74.

- (iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33 ;
- (iv) the property of the debtor shall be realized with all reasonable despatch and thereafter, when practicable, distributed in a single dividend ;
- (v) the debtor shall apply for his discharge within six months from the date of adjudication ; and
- (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure :

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly.

History.—Summary administration of estates was provided in section 48 of the Act III of 1907. It was a very brief section and ran as follows :—

“When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon—

(a) the estate shall, where practicable, be distributed in a single dividend ;

(b) the provisions of this Act shall be subject to such other modifications as may be prescribed with the view of saving expense and simplifying procedure ;

Provided that nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor.”

The section in the present Act has been considerably amplified and is much more complete. It also gives the court power to direct at any stage of the summary administration of an estate that the ordinary procedure provided for in this Act shall be followed. The insolvency courts under the Act III of 1907 had not that power. It may also be noted that the present section also modifies the provisions relating to discharge and the framing of schedule, etc., which was not done in the old section. Again, under the section as it is now, the property of the debtor vests in the court as a receiver on the admission of the debtor's petition. Under the old Act, the summary administration of petty insolvencies was governed by rules made by the High Courts under

section 51 (2) (e) of that Act, but it was thought desirable that the Act itself should contain more detailed provisions than before and that further simplification of procedure should be effected (1). **S. 75.**

Analogous law.—Small insolvencies are provided for in S. 106, P-t. I. A., 1909, and S. 129, B. A. of 1914. It is not necessary to reproduce these provisions here because they are not likely to be of any help or much use.

Amendment in the Punjab.—In section 74 of the Provincial Insolvency Act, 1920, for the words “five hundred rupees” the words “two thousand rupees” shall be substituted (2).

Debtor's property should not exceed in value five hundred rupees.—Before an order is made for summary administration the court must be satisfied by an affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees. The property of the debtor means the property which is divisible amongst the creditors. Under the Presidency-towns Insolvency Act, the court may, by the wording of the section itself, make an order on the report of the official assignee that the property is not likely to exceed the prescribed amount without insisting or calling for an affidavit (3). The report is *prima facie* to be acted upon and the court ought not, at any rate without any definite reason, to refuse to make the order (4). Under the Provincial Insolvency Act there is no bar to the court in acting upon the report of the receiver alone without any other evidence for the purpose of satisfying itself that the value of the debtor's property is not likely to exceed five hundred rupees.

Sub-clause (2).—The court, on the admission of a petition by the debtor, itself becomes a receiver and it is improper for the court to appoint any interim receiver under section 20 of the Act (5). The court may also take action under sections 53 and 54 for avoiding alienations of its own accord.

Clause 6; insolvency rules as to summary administration.—See Calcutta rule 30, Madras rule 23, Bombay rule 25 and Allahabad rule 34.

PART VI.

APPEALS.

75. (1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final :

(1) Statement of Objects and Reasons.

(2) Section 4, The Punjab Relief of Indebtedness Act, VII of 1934.

(3) See section 106, P-t. I. A., also see *Re Horniblow*, 1885, 2 Mor. 24.

(4) *Re Horniblow supra*.

(5) *Ramnath, v. Vijayaraghavalu*, 1927, 106 I. C. 84 : A. I. R. 1927 Madras 983.

S. 75. Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively.

History.—Section 46 of the Act III of 1907 dealt with appeals and is now substituted by the present section. Section 46, sub-section (1), P. I. A., 1907, ran as follows :—

“Any person aggrieved by an order made in the exercise of insolvency jurisdiction by a court subordinate to a District Court may appeal to a District Court, and the order of the District Court upon such appeal shall be final.....”

In sub-section (1) of the present section the words ‘any person’ which occurred in the old Act have been substituted by the words ‘the debtor, any creditor, the receiver or any other person.’ The reasons for this amendment were thus explained in the Select Committee Report : “There are conflicting decisions of the High Courts as to the meaning of the words ‘any person aggrieved.’ We have, therefore, proposed further amendments in section 46 of the Act with the object of making it clear that creditors as well as the receiver are entitled to the benefits conferred by that section” (1). There appears to be a difference of opinion as to the exact effect of the amendment. It has been held by the Oudh Chief Court that the effect of the amendment is to extend the scope of persons who can appeal and that a creditor has a right of appeal, even though he may not be a person aggrieved by an order of the court (2). A different view has

(1) Select Committee Report, dated 24th September, 1919.

(2) Har parshad v. Darghai Lal, 8 O. W. N. 1318 : A. I. R. 1932 Od. 61.

been taken by the Nagpore High Court. It has held that the debtor, or any creditor, or the receiver can only appeal if they are aggrieved by a decision or order of the insolvency court and not otherwise (1). It is submitted that the Nagpore view is the correct one, and that Mr. Mulla is also of the same opinion as the Nagpore High Court (1). S. 75.

The second proviso to sub-section (1) is new. It provides for a second appeal from orders passed under section 4 by courts subordinate to the District Court. The reason for the addition is the same as that for the addition of section 4, which is new in the Act V of 1920 and did not exist in the Act III of 1907. Under the Act 3 of 1907, it was doubtful whether the insolvency court had jurisdiction to decide questions of title against third persons. Section 4 has been enacted with a view to set that doubt at rest and to confer very wide powers of deciding questions of title on the insolvency courts. As a safeguard against the improper exercise of those powers it was, at the same time, thought desirable to provide a second appeal from such orders.

Sub-section (2) of Section 46, P. I. A., 1907, mentioned the orders passed by a District Court and from which a first appeal was provided to the High Court. In the present Act those orders have been specified in Schedule 1. The orders are the same as they were provided for in the old Act, except that section 4 is also mentioned in the Schedule 1. Sub-sections (2), (3) and (4) of S. 46, P. I. A., 1907, are the same as the corresponding sub-sections of the present section, except for a minor alteration that instead of the words "any person aggrieved" we have words "any such person aggrieved." The alteration, however, does not make any difference and simply resulted in consequence of the amendment made in the first sub-section.

Analogous Law.—Under the Presidency-towns Insolvency Act, the insolvency jurisdiction is exercised generally by a judge of the High Court or by an officer of the court to whom powers have been delegated under section 6 of that Act. (For that see the heading, "Analogous Law," under S. 80. P. I. A., 1920) Section 8, sub-section (2) runs as follows :—

"Orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows, namely :—

(a) an appeal from an order made by an officer of the Court empowered under section 6 shall lie to the Judge assigned under section 4 for the transaction and disposal of matters in insolvency and no further appeal shall lie except by leave of such Judge ;

(b) save as otherwise provided in clause (a), an appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court."

It may be noticed that the law as to the persons who can appeal from an order in insolvency is the same under both the Acts, *i. e.*, only a person aggrieved by an order has a right of appeal and nobody else. There is no provision in the Provincial Insolvency Act similar to S. 6, P-t. I. A., and the provisions in the case of the High Courts, when any one of

(1) *Pur Singh v. Munshi Alladad Khan*, A. I. R. 1933 Nagpore 9 : 141 L. C. 350.

(2) Mulla's Law of Insolvency, page 543, para 816.

S. 75. its judges exercises original jurisdiction are contained in S. 98, C. P. C., and the Letters Patent of the High Courts.

Section 08, sub section (2), B A. of 1914, which has replaced section 104 of the B. A. of 1883, is as follows :—

“Orders in bankruptcy shall, at the instance of any person aggrieved, be subject to appeal, as follows :—

(a) Where the order is made by a county court, an appeal shall lie to a divisional court of the High Court, of which the judge to whom bankruptcy business is for the time being assigned shall, for the purpose of hearing any such appeal, be a member. The decision of the divisional court upon any such appeal shall be final and conclusive, unless in any case the divisional court or the Court of Appeal sees fit to give special leave to appeal therefrom to the court of appeal, whose decision in such case shall be final and conclusive ;

(b) Where the order (not being an order on appeal from a county court) is made by the High Court, an appeal shall lie to the Court of Appeal and an appeal shall, with the leave of the Court of Appeal, but not otherwise, lie from the order of that court to the House of Lords ;

(c) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.”

The English cases have been followed in India as to the meaning of the words ‘any person aggrieved’ in order to decide as to whether a person has a right of appeal from an order in bankruptcy matters or not. The provision relating to leave to appeal in the English section is also similar in that the leave may be granted by the Appellate Court or the court which passes the order to be appealed against.

Retrospective effect of the section.—It has been held that where the receiver took action which gave rise to a question of title whether certain property was still the property of the insolvent or had been a subject of a valid alienation before the coming into operation of the present Act and the decision was pronounced by the district court after the said Act, an appeal lay under the Act at the instance of a creditor who was affected by the decision as a matter of right (1). Similarly it was held, under the Act III of 1907, by the Lahore High Court that all orders, passed after the Act 3 of 1907, in insolvency proceedings, are governed by this Act so far as the right of appeal or revision is concerned, although the adjudication had been made before it came into force (2). In a Madras case, however, it was held that the rule laid down in S. 46, P. I A., 1907, disallowing an appeal against an order refusing a set-off, except with the permission of the District Court or the High Court, had no application where the insolvency proceedings commenced before that Act came into force and that the right of appeal in such cases was regulated by section 353 of the Civil Procedure Code, 1882 (3).

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(1) Shikri Prasad v. Aziz Ali, 63 I. C. 601 : 44 All. 7 : A. I. R. 1922 All

(2) Chuni Lal v. Behari Lal, 33 I. C. 995 : A. I. R. 1916 Lah. 360.

(3) Salimamma v. Valli Hussanamma, 11 I. C. 652 : 21 All. 1172.

Who may appeal : person aggrieved.—The leading English case on the meaning of the expression "person aggrieved" is the judgment of James, L. J., in *Ex parte Sidebotham* (1). There it was explained in these terms :—"It is said that any person aggrieved by any order of the court is entitled to appeal. But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something."

S. 75.

It was a case under the Bankruptcy Act, 1869. In that case, the comptroller in Bankruptcy made a report that the trustee in bankruptcy had been guilty of misfeasance, by which the estate had suffered a loss of 1,253 pounds, that he had called upon the trustee to make good the loss but he had failed to do so, and applied to the court to enforce the requisition against the trustee. The court refused to make any order. The comptroller did not appeal from this refusal but the bankrupt, Sidebotham, who had not obtained his discharge, appealed. It was contended on behalf of the bankrupt that if the order asked for by the comptroller had been made and the trustee had been directed to pay 1,253 pounds, the estate would have paid a dividend of more than 14 shillings in a pound, and then, under section 48 of the Act, the bankrupt would have been entitled to his discharge. This argument was not accepted on the ground that the bankrupt was not a person aggrieved. "In the present case," said James, L. J., "No one is prejudiced by the refusal of the court to act on the comptroller's report, except in so far as he has lost any benefit which he might have obtained if an order had been made; there is nothing to embarrass in any proceedings which he may wish to take against the trustee. If there has been any misfeasance on the part of the trustee, the bankrupt or any creditor have a right under section 20 to apply to the court, not because the comptroller has made a report to the court, but because he is entitled to make his own case against the trustee (2). The next leading case in which the point was again considered is *Ex parte Official Receiver* (3). The expression "legal grievance" used in the classical judgment of James, L. J., was further explained as meaning that the grievance suffered must be a legal grievance and that a pecuniary grievance or a grievance to property or person may not of itself be legal grievance. Again, as to the expression "wrongfully refused him something" of Lord Justice James, it was said that it cannot mean "wrongfully refusing him something unless it be a refusal of something for which he had a right to ask."

The above two English cases have been followed in almost every case, both English and Indian (4), in which the question arose whether a person was a person aggrieved so as to entitle him to appeal, though the result of the decisions, so far as India is concerned, has not been quite uniform. Any person who asks for a decision from a court which he

(1) 1880, 14 Ch. D. 458.

(2) *Ex parte Sidebotham*, 1880, 14 Ch. D. 458, 466.

(3) 1887, 19 Q. B. D. 174.

(4) *Murad v. Official Receiver*, Sargodha, 160 I. C. 794 : A. I. R. 1935 Lahore 952; *Gurbaksh Singh v. Amarnath*, 160 I. C. 509 : A. I. R. 1935 Lah. 818,

S 75. has a right to ask is certainly a person aggrieved but any person who is brought before a court to submit to its decision is, if the decision goes against him, is also a person aggrieved by the decision (1). Thus it has been held that an alienee from the insolvent under a transfer which is sought to be avoided by a receiver under section 36 is a person aggrieved and has a right of appeal. A person is aggrieved by an order passed under S. 36, P. I. A., 1907, (corresponding S. 53, P. I. A., 1920) in the following cases :—

(i) where he is a party to an order, or, if he is not, where he is bound by the order and the order affects his interests, *i.e.*, his person or his property injuriously.

(ii) where he is a party to an order and has suffered a legal grievance thereby inasmuch as something was wrongfully refused which he was entitled to demand or something was wrongfully granted to someone which he was entitled to object to, though he was not beneficially interested in the result.

(iii) a person who is not a party to an order and is not bound by it and whom the order does not touch, even though it may directly affect him or disappoint him of a benefit which he might have received, if the order had been different and a person who, though a party, has suffered no legal grievance thereby legal or beneficial, is not a person aggrieved by the order (2). Thus an alienee of the insolvent's property is not a person aggrieved by an order admitting proof in a creditor's favour, because he has no right to be heard against such a creditor as a matter of right. The fact that he was allowed by the lower court to cross-examine the witnesses of the creditor would not give him such a *locus standi* in the proceedings as to give him a right of appeal (3).

Appeal by debtor.—The debtor may appeal if he is a person aggrieved and not otherwise. The insolvent has after adjudication no legal interest in his estate which vests in the official assignee, and he has, therefore, no legal right to interfere in the realisation of that estate and he cannot be treated as aggrieved by any order passed in the course of such realisation. It is true that if any surplus remains after the creditors are paid in full, such amount will be paid over to the insolvent, and it is also true that if a certain proportion of his debt is paid from his assets he will be entitled to a discharge. But these are merely expectations which may or may not be realised. They do not give any legal right to the insolvent to interfere in the realisation of his property which is entirely left to the official assignee (4). Accordingly it has been held by the Allahabad and the Madras High Courts that an insolvent has no right of

(1) *Re Lamb*, 1894, 2 Q. B. 805, 812; *Ex parte* Official Receiver, 1887, Q. B. D. 174, 178; *Keotokey Charan Banerjee v. Sarat Kumari Dabee*, I. C. 71 : A. I. R. 1917 Cal. 89.

(2) *Kumarappa Chettiar v. Murugappa Chettiar*, 36 I. C. 771 : A. I. R. 17 Mad. 411.

(3) *Alagappa Chettiar v. Vellachami Servai*, 112 I. C. 623 : A. I. R. 1928 Mad. 98 (1).

(4) *Ex parte* Sheffield, 1878, 10 Ch. D. 434; *In re Leadbitter*, 1878, 10 Ch. D. 388; *Venkataramanayya v. Bangarayya*, 154 I. C. 96 : A. I. R. 1935 Mad. 107 (1).

appeal from an order confirming a sale of property by the official assignee (1) **S. 75.** or from any other order passed in respect of the sale of the insolvent's property (2). In another Madras case, where the claim of a creditor was wrongly admitted and the insolvent appealed against the order, it was held that the insolvent is a person aggrieved within the meaning of S. 46 (2), P. I. A., 1907, for under S. 41, P. I. A., 1907, (corresponding to S 57, P. I. A., 1920) he will eventually be entitled to any surplus remaining after the creditors have been satisfied (3). This case was disapproved by a full bench of the same High Court in *Hari Rao v. Official Assignee, Madras* (4), though it was not expressly declared to have been wrongly decided. In a Lahore case, the Allahabad and Madras view was not followed and it was held that the insolvent had a right of appeal under the present Act from an order passed in respect of the sale of his property. The ground of the decision was not that the insolvent is an aggrieved person but that under the present Act, unlike the Act III of 1907, an insolvent has a right of appeal, whether he is a person aggrieved or not (5).

There may however be cases where the debtor is affected by an order of the court in his individual capacity and not only in the sense that his estate is affected primarily and he only indirectly. Section 28 (5) exempts certain properties of the insolvent from vesting in the receiver. If a property so exempted is claimed by the receiver or the insolvency court he is entitled to be heard and if an order is passed against him he may appeal from it. If the insolvency court directs any such property to be sold, the insolvent is a person aggrieved and is entitled as such to appeal from the order (6). Similarly section 66 provides for the giving of an allowance to the insolvent out of his estate. It is submitted that the insolvent has a right of appeal from such an order.

In section 24, sub-section (3) of the Act III of 1907, provision was made for a notice to the insolvent at the time when any creditor wanted to tender proof of his debt at a late stage. The corresponding section 33 of the present Act has omitted that provision and instead provided a notice to the receiver. The change in the law is a clear indication of the intention of the legislature that the insolvent cannot appeal against an order admitting a person as a creditor (7). The insolvent is entitled to be heard and object to an order of adjudication being passed against him. He can, therefore, appeal from an order of adjudication. Where on an application by the receiver for directions, notice is served upon the insolvent, but at

(1) *Hari Rao v. Official Assignee*, High Court Madras, A. I. R. 1926 Mad. 556 : 94 I. C. 642 : 49 Mad. 461 Full Bench.

(2) *Sakhawat Ali v. Radha Mohan*, 41 All. 243 : 49 I. C. 816 : A. I. R. 1919 All. 284.

(3) *Sivasubramania Pillai v. Theethiappa Pillai*, 75 I. C. 572 : 47 Mad. 20 : A. I. R. 1924 Mad. 163 ; See also *Anandji Damodhar v. James Finlay & Co.*, 62 I. C. 441 : 15 S. L. R. 28 : A. I. R. 1921 Sind 36.

(4) A. I. R. 1926 Mad. 556 *supra*.

(5) *Ram Chandra v. Mohra Shah*, 119 I. C. 427 : A. I. R. 1929 Lah. 622.

(6) *Arman Sardar v. Satkhira Joint Stock Co., Ltd.*, (1913) 18 C. L. J. 564 : 20 I. C. 273 ; *Ram Chand v. Shop Mohra Shah*, 119 I. C. 427 : A. I. R. 1929 Lah. 622.

(7) *Re Benoist*, 1909, 2 K. B. 784 ; *Ganga Sahai v. Mukkarram Ali Khan*, 97 I. C. 556 : A. I. R. 1926 All. 36.

- S 75. the hearing the court refuses him a hearing, he is a person aggrieved and entitled to appeal from the refusal (1).

Appeal by creditor.—In an Oudh case, it has been held that a creditor has a right of appeal, even if he is not a person aggrieved by the decision appealed from (2). The decision is based on the change in the wording of sub-section (1), para. 1, which was made by the Act V of 1920. The more correct view, however, appears to be that a creditor cannot appeal in every case but only when he is a person aggrieved (3). A creditor may be affected by an order passed in insolvency proceedings in more than one way. Where it is the individual interest of the creditor which is affected and is opposed to the interests of other creditors, he is clearly a person aggrieved and has a right of appeal.

A person who has been allowed to intervene in the insolvency proceedings as a creditor, and whose application to include some more persons as debtors in the insolvency has been dismissed is a person aggrieved within the meaning of the Act, though his debt had not been proved at the time he was allowed to intervene (4). A person claiming to be a creditor, who has not tendered a proof at the date of the appeal is not a person aggrieved (5). But a creditor is a person aggrieved by an order approving a scheme of arrangement, although at the date of the order her proof had not been tendered, or, though tendered, had neither been admitted nor rejected before the appeal (6). Where a creditor of an insolvent filed a petition to set aside a sale of some of the insolvent's property by the official receiver of the insolvent's estate and subsequently it was found that he had collusively withdrawn his petition and allowed it to be dismissed by the court and another creditor of the same insolvent applied to have the order of dismissal reviewed and to have himself added as a party in that petition but was not made a party to the proceedings, and he, under S. 68. P. I. A., 1920, appealed *bona fide* against the order of dismissal, it was held that though the creditor who was appealing was not a party to the proceedings still, having regard to the fact that he was aggrieved by the order appealed against, he could come within the terms of section 75 and would be entitled to prefer the appeal (7). Creditors who have tendered their proofs are persons aggrieved by the order of the court annulling adjudication and are thus entitled to appeal as persons aggrieved (8). Where a person is adjudicated insolvent at the instance of the creditors, they are obviously aggrieved by an order of annulment of adjudication and have a right of appeal (9). An unpaid creditor may

(1) *Re Webb & Sons*, 1887, 4 Morr. 52.

(2) *Harpershad v. Darghai Lal*, A. I. R. 1932 Oudh 61; 135 I. C. 893.

(3) *Mulla's Law of Insolvency*, page 645; *Daulat Ram Vidva Parkash v. Bansilal*, A. I. R. 1937 Lah. 2.

(4) *Dinajpore Trading & Banking Co., Ltd., v. Provash Chandra Sen*, A. I. R. 1933 Cal. 151; 142 I. C. 484.

(5) *Exp. Ditton*, 11 Ch. D. 56.

(6) *Re Langtry*, 1 Mans. 169.

(7) *Pulli Goundan v. Kumara Swami Goundan*, 55 Mad. 313; 135 I. C. 742; A. I. R. 1932 Mad. 162; See also *Kumar Sarat Kumar Roy v. Nabin-chandra*, 56 Cal. 667 F. B.; A. I. R. 1928 Cal. 786; 115 I. C. 29, a case under the Presidency-towns Insolvency Act.

(8) *Abbirreddi v. Venkatarreddi*, 94 I. C. 351; A. I. R. 1927 Mad. 175.

(9) *Firm Jai Singh Dayal Singh v. Narmal Das*, 92 I. C. 925; A. I. R. 1926 Lah. 24.

appeal against an order granting discharge to the insolvent (1). Similarly 3. 75. he may appeal from a protection order (2).

As to the right of a creditor to appeal from an order of the court refusing to prosecute the insolvent for an offence under section 69, see commentary under that section.

Where in the original proceedings the individual creditors' interests are homogeneous with those of the rest so that the official receiver can represent all, the proper person to move is the official receiver and the individual creditor cannot move unless there is a decision against him for which he can come up under section 68. But in the matter of appeals an individual creditor can always appeal whether or not the official receiver does; only if his interests are homogeneous with those of the rest of creditors, then in such a case he must make his a petition a representative petition on behalf of all the creditors. The fact that the appellant was not in his individual capacity a party to the original petition does not preclude him from appealing as he should generally be deemed as represented by the official receiver (3). In the case last cited the official receiver was not moved in the matter before the creditor had appealed. In an Allahabad case, decided under the present Act, the court went still further and held that a creditor is a person aggrieved from an order allowing the claim of a third person in respect of property alleged to be that of the insolvent on the ground that it reduces the amount of property out of which he is entitled to claim a dividend (4); and the Allahabad view has been followed by the Lahore High Court (5).

The creditor's right of appeal, when his interests are homogeneous with the general body of creditors, has been considered most often in cases of petitions under sections 53 and 54 of the Act. Under the Act III of 1907, there was a conflict of opinion as to whether a creditor had a right of appeal from an order under section 36 of the court refusing to set aside an alienation. The conflict did not only exist in the matter of appeals but also in regard to the initiation of proceedings under those sections in the original insolvency proceedings. The Madras High Court had held that an individual creditor was a person aggrieved by an order under Ss. 36 and 37, P. I. A., 1907 (corresponding to sections 53 and 54 of the present Act) (6), whereas the Allahabad High Court had held the contrary view (7). Section 54A was enacted to set that conflict at rest. In enacting section 54A, the legislature adopted the view of the Madras High Court. We have considered the matter fully under that section. According to the English Law the trustee represents all the creditors and

(1) *Ex parte* Castle Mail Packet Co., 1885, 18 Q. B. D. 154; Sheikh Habiburrahman v. Nurul Hassan Khan, A. I. R. 1937 Oudh 450.

(2) Mahomed Haji Essack v. Sheikh Abdul Rahman, 1916, 40 Bom. 461 : 31 I. C. 507.

(3) Chowdappa v. Katha Perumal, 96 I. C. 944 : 49 Mad. 794 : A. I. R. 1926 Mad. 801.

(4) Naidar v. Ramji Lal, A. I. R. 1925 All. 549 : 88 I. C. 944 : 4 All. 849.

(5) Radhe Kishan Tirath Ram v. Fateh Mahomed, A. I. R. 1933 Lah. 856 : 147 I. C. 262; Gandaram v. Shivanand, A. I. R. 1937 Lah. 757; Barkat Rai v. Jewanmal, A. I. R. 1934 Lah. 968 (1).

(6) Tiruvenkatachiar v. Thangiaammall, 1916, 39 Mad. 479 : 29 I. C. 294 : A. I. R. 1915 Mad. 1177.

(7) Jhabba Lal v. Shibcharandas, 39 All. 152 : 37 I. C. 76 : A. I. R. 1917 All. 160.

S. 75. all proceedings relating to the bankrupt must be taken by him or in his name. If he refuses to act or allow his name to be used, any creditor can apply to the court for leave to use his name on giving him an indemnity against costs. The rule embodied in section 54A differs from the English law in that it allows a creditor to initiate proceedings in his own name. In actual practice the working of section 54A, when applied to appeals or to insolvency proceedings, will not be very different from the English practice, for in both cases the matter has been left in the discretion of the court. The principle underlying section 54A should be applied to appeals as well (1). And it has in fact been so applied in a case by the Lahore High Court (2)

Appeal by receiver.—The third person who has been specifically mentioned in sub-section (1) is the receiver. The insolvent's estate vests in him and for all practical purposes he represents the general body of creditors. Any order which affects the insolvent's estate or the general body of creditors can be appealed from by the receiver. Thus he can appeal from an order under section 53 or 54, an order under section 50, an order under section 68 and so on. Most of the orders passed by the insolvency court generally affect the estate or the interests of the creditors. Where a creditor whose claim to be paid in full was rejected by the official assignee, moved the insolvency court making the official assignee a party and obtained an order directing payment in full, the official assignee was held to be a person aggrieved (3). Apart from the receiver's right to appeal in his capacity as representing the insolvent's estate or the general body of creditors, there may be cases where his own individual interests are affected. Thus he has been held to have a right of appeal from an order of the insolvency court directing his removal (4). The receiver is, however, not an aggrieved person from an order refusing to take action under section 43 (2) (now section 69) (5).

Appeal by any other person aggrieved.—Besides the debtor, the creditor and the receiver, the right of appeal has been given by the sub-section to every person, whether a party to the proceedings or not, aggrieved by an order of the insolvency court. Thus it has been held that assignees under a deed for the benefit of creditors (6), a trustee under a deed of arrangement (7) and a bill of sale holder (8) are persons aggrieved by an order of adjudication, as the order might affect their title. These cases were decided on the law contained in sections 10 and 11 of the Act of 1869. It is not necessary to go into the history of these sections. Suffice it to say that an order of adjudication affects the rights of persons

(1) Mulla's Law of Insolvency, page 548.

(2) *Puranchand v. Ramchandra*, 132 I. C. 530 : A. I. R. 1931 Lah. 651.

(3) *Official Assignee v. Ram Chandra*, 33 Mad. 134.

(4) *Official Receiver, Tanjore v. Nataraja Sastrigal*, 72 I. C. 225 : 46 Mad. 405 : A. I. R. 1933 Mad. 355.

(5) *Bhagwant Kishore v. Sanwal Das*, 61. I. C. 802 : A. I. R. 1921 All. 245 (1). Also see commentary under sections 69 and 70.

(6) *Exp. Sadler*, 48 L. J. Bk. 43.

(7) *Re Batten*, 22 Q. B. D. 685.

(8) *Exp. Thoday*, 2 Ch. D. 221. See on appeal, *Exp. Ellis*, 2 Ch. D. 245. Also see *Exp. Learoyd*, 10 Ch. D. 31. *Re A Debtor*, 101 L. T. 344.

who may not be parties to the proceedings which lead to the order of adjudication. For instance, on the making of an order of adjudication the title of the receiver relates back to the date of the presentation of the petition under section 28 (7), and there may be transfers in favour of third persons, having taken place during this period, which would have been perfectly valid but for the order of adjudication. Such transferees are persons aggrieved within the meaning of this section and have a right of appeal, though they may not be parties to the proceedings. A witness summoned for examination under section 59 A may appeal to have the order discharged (1). The expression "any other person" includes a person against whom a decision is given under section 4 which relates to questions of title, priority, etc., or section 53 which relates to voluntary transfers or section 24 which relates to fraudulent preferences (2). S. 75

Appeals from orders passed by a court subordinate to a District Court.—Under section 3 of the Act the Local Government may by notification in the Local official gazette invest any court subordinate to a District Court with jurisdiction to try any class of cases under the Act, and the jurisdiction of the courts so invested will be concurrent with the District Court. It may seem anomalous that appeals from the decisions of a subordinate court having concurrent powers with the District Judge should lie to the District Judge. Section 75 (1), however, clearly contemplates the exercise of insolvency jurisdiction by a subordinate court and expressly provides that appeals from such orders shall lie to the District Court (3). The appeal will lie to the District Court in all cases irrespective of the value of the property involved (4). Whether a court is subordinate to a District Court for the purposes of appeal is a fact which depends upon the constitution of courts prevailing in different provinces. In almost all provinces there are what are usually called Additional District Judges appointed under the Provincial Civil Courts Act of each province. Thus it has been held that an Additional Judge, who exercises the powers of a District Judge by virtue of assignment of some of his functions by the latter officer under section 8 of the Bengal, N. W. P. and Assam Civil Courts Act, (Act 12 of 1887), is not a court subordinate to the District Court as contemplated in Ss. 3 and 46, P. I. A., 1907; and an appeal shall lie to the High Court from the Additional Judge's order sentencing an applicant for an insolvency offence under section 43 (5). Before the Punjab Courts Act, 1922, it was declared by the Punjab Government notification, Judicial, Home Department, No. 889, dated the 18th November, 1908, that the divisional court was to be deemed the district court or the principal civil court of original jurisdiction for the purposes of any proceedings under the Provincial Insolvency Act. It was therefore held that appeals from orders

(1) *Re A Debtor*, 1917, 1 K. B. 558; *Kumar Sarat Kumar Ray v. Nabin Chandra*, 56 Cal. 637; 115 I. C. 29; A. I. R. 1928 Cal. 786 F. B. (case under the Presidency-towns Insolvency Act).

(2) See *Alagappa Chettiar v. Vellachami Servai*, 112 I. C. 623; A. I. R. 1928 Mad. 981 (1).

(3) *Nidhon Mullick v. Ramani Mohan*, 63 I. C. 848.

(4) *Alagiri Subba Naik v. The Official Receiver, Tinnevely*, 54 Mad. 989; *Fool Kumari Dasi v. Khirod Chandra*, 102 I. C. 115; A. I. R. 1927 Cal. 474.

(5) *Makhan Lal v. Sri Lal*, 14 I. C. 162; 34 All. 382, followed in *Chiranji Lal v. King Emperor*, 25 I. C. 986; 36 All. 576; A. I. R. 1914 All. 276.

S. 75. of a court subordinate to the divisional court lay to the divisional court and not to the Chief Court (1). Under the Punjab Courts Act, 1922, a senior sub-judge is a court subordinate to the district judge, and an order passed by him in the exercise of insolvency jurisdiction can be appealed from to the district judge and not to the High Court (2). Here an insolvency proceeding was commenced under chapter XX of the Code of Civil Procedure, 1883, and the District Judge after the passing of the Insolvent Act, on adjudging the petitioner insolvent, transferred the case to the Deputy Commissioner, who set aside a transfer made by the debtor insolvent under section 36, Insolvency Act. It was held that an appeal lay against the order of the Deputy Commissioner to the District Court either under S. 283, C. P. C., or under section 46, Insolvency Act (3). In a very similar later case the Calcutta High Court held that an appeal against an order of the Court of Deputy Commissioner who was invested with the powers of a subordinate judge in the exercise of insolvency jurisdiction lay to the district judge and not to the High Court (4). In Nagpore it has been held that an appeal from the decision of a sub-judge in insolvency jurisdiction lies to the district judge and that an appointment as an additional district judge under section 26 (1), Central Provincial Courts Act, cannot be implied from an appointment as an insolvency judge under the Insolvency Act (5). In Burma it has been held, having regard to the Burma Courts Act, 1922, as amended by Burma Act IV of 1952, that a first appeal from an order of an Assistant District Court passed in its insolvency jurisdiction lies to the District Court and not the High Court (6).

Official receiver is not a court.--Section 59 lays down the duties and powers of receivers and where the receiver is an official receiver provision is made for delegating certain powers to him by the High Court with the sanction of the local Government in section 80. The powers which could be so delegated were wider and of more judicial nature under section 52 of the Act III of 1907 than they are now under the present Act. Still even under the present Act, the official receiver can be authorised and is generally authorised to pass orders of a judicial nature. Section 68 provides that if any person is aggrieved by any act or decision of the receiver he may apply to the court and the court may confirm, reverse or modify the act or decision complained of or make any such order as it thinks just. The word used in the section for the mode of moving the court is "apply" and it is an application which is to be made. In the marginal note the relevant words are "appeal to court against receiver." By section 80, sub-section (2), it is provided that subject to appeal to the court provided for by section 68, any order made or act done by the official receiver in the exercise of the powers conferred under sub-section (1) of that section shall be deemed the order or act of the court. If all these provisions are read together, it appears doubtful whether the official receiver is a court or not.

(1) *Ram Kishen v. Umrao Bibi*, 33 I. C. 730 : A. I. R. 1916 Lah. 307 ; *Mansa v. Nathu*, 8 I. C. 435 : 3 P. R. 1911.

(2) *Chiragh Din v. Fateh Mahomed*, A. I. R. 1933 Lah. 307 (1) : 149 I. C. 24.

(3) *Changmull v. Jai Narain*, 15 C. L. J. 239 : 13 I. C. 605.

(4) *Chatterbuj v. Har Lal*, 80 I. C. 858 : A. I. R. 1925 Cal. 385.

(5) *Madho Rao Deora v. Naga*, 71 I. C. 37 : A. I. R. 1923 Nag. 80.

(6) *An Ewain v. Receiver, Baitun District Court*, A. I. R. 1934 Rang. 12 Rang. 352 : 151 I. C. 700.

The point is important in this way. If the official receiver is not a court, an appeal will lie from his order under section 68 to the court. The expression "the court" is not defined in the Act. In the Presidency-towns Insolvency Act, it is defined as the "court, exercising jurisdiction under this Act," and there was a similar definition of the word in section 2 (1) (g) of the Provincial Insolvency Act, 1907, but that definition has been omitted in the present Act. If we ignore the words "subject to the appeal to the court provided for by section 68" in section 80, sub-section (2), it is clear that the official receiver will be a court subordinate to the District Court and an appeal will lie from his order to that court. But as the sub-section stands, it has to be read with section 68. Under section 68, it seems reasonably clear that the court referred to in that section is the court in which the insolvency proceedings are pending. The point arose in two Madras cases. In one it was held that an official receiver appointed under the Provincial Insolvency Act of 1907, has, when duly authorised by the High Court, the same powers as the district court as regards dismissal of applications and adjudication of insolvency; and that his order of dismissal of a petition is open to appeal to the district court under section 22, clause 2, read with section 52 of that Act and that an appeal from such an order directly to the High Court is not maintainable (1). In this case the remedy of an aggrieved person under S. 22, P. I. A., 1907, (now section 68) was called an appeal. In the second Madras case the court considered the two questions whether the official receiver is a court and whether an application under section 22 against his decision is an appeal, separately. And, on a consideration of the English cases and the relevant provisions of the Act III of 1907, it held that an official receiver is not a court subordinate to the district court within the meaning of section 46 (1), and that the order of the district court under section 22 is not one passed in appeal and therefore not final (2). Even before the case last cited it was held that an application under section 68 was not an appeal (3). The same view was taken by the Allahabad High Court, which held that an order passed by the district judge under section 68, is an original order and not one passed in appeal (4). Under the present Act also the same view has been held. Thus where property is seized by a receiver as belonging to an insolvent and a claim is preferred under section 68 by a third party to such property and the claim is allowed, the matter is one which falls under section 4 and an appeal lies under section 75 without the leave of the court (5). Similarly an order of the district judge under section 68 dismissing the application of an aggrieved party on the ground that it was made beyond 21 days after the receiver had taken possession of the property is appealable (6).

(1) *Chidambaram Chetty v. Nagappa Chetty*, 38 Mad. 15 : 16 I. C. 820 : A. I. R. 1916 Mad. 1014.

(2) *Allapichai v. Kuppai Pichai Rowther*, 40 Mad. 752 : 39 I. C. 429 : A. I. R. 1918 Mad. 964.

(3) *Durai Swami Ayangar v. Meenakashi Sundara Iyer*, A. I. R. 1915 Mad. 360 (1) : 25 I. C. 610 ; *Thakur Prasad v. Panno Lal*, 1913, 35 All. 410 : 20 I. C. 673.

(4) *Mul Chand v. Murari Lal*, 36 All. 8 : 21 I. C. 702 ; *Balli v. Nand Lal*, 33 I. C. 773 : A. I. R. 1915 All. 349.

(5) *Ghani Muhammad v. Dina Nath Puri*, 108 I. C. 602 : A. I. R. 1928 Lah. 556.

(6) *Chandra Nath Sen v. Nagindra Nath*, 107 I. C. 467 : A. I. R. 1928 Cal 263 (2).

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We therefore, arrive at the following result :--

An official receiver is not a court and an application under section 68 which lies to the court in which the insolvency proceedings are pending is not an appeal and that an order passed by the court under section 68 is to be treated as an original order of the court for the purposes of appeals as provided in section 75. If the order under section 68 is passed by or, which is the same thing, the court in which the insolvency proceedings are pending is a court subordinate to the district court the first appeal shall lie to the district court and if the order under section 68 is made by the district court, the first appeal shall lie to the High Court.

Are all orders of a subordinate court appealable.—Sub-section (1) is quite general in its wording. It says that an appeal shall lie from a decision or any order of the subordinate court. Under the Code of Civil Procedure all orders of whatever nature of a court are not appealable. Section 104 and Order 43 of the Code enumerate the various orders from which an appeal lies. S. 5, P. I. A., 1920, provides that, subject to the provisions of the Act, the court, in regard to the proceedings under the Act, shall have the same powers and shall follow the same procedure as it follows in the exercise of its original civil jurisdiction. The point for consideration arises as to whether the provisions of the Code of Civil Procedure can be utilised for the purpose of restricting appeals from orders passed by a subordinate court to a certain class of orders only, *i.e.*, only those orders which are in their nature final and determine the rights of the parties. The difficulty does not arise where the district court is the original insolvency court. In that case only orders specified in the Schedule are appealable; all other orders, whether interlocutory or final in their nature, are not appealable. The difficulty in accepting the above view with regard to the orders of subordinate courts is that there is no fixed criterion by which to judge the appealability or non-appealability of an order. On the other hand, if section 75 (1) be interpreted to mean that each and every order of the subordinate court, of whatever nature or importance it may be, is appealable, it shall provide a fruitful source of delay and unnecessary litigation. There is no reported case specifically dealing with this point and it appears that no difficulty has arisen in practice. The appellate powers of the district court can be utilised or used in such a manner as to put a check upon unnecessary appeals.

Where, however, the court passes an order not under the powers conferred by the Provincial Insolvency Act but, by virtue of section 5, by the Code of Civil Procedure, it is obvious that the procedure for appeals from such orders shall be governed by the Code of Civil Procedure. Thus to take an instance, the Provincial Insolvency Act does not give any powers of reviewing their own orders to the insolvency courts, but the powers of review conferred on courts, both original and appellate, by C. P. C. have been exercised by them. A district judge can grant a review and in appeal from that order the High Court will be guided by the procedure laid down in Civil Procedure Code, and will not interfere with the order under appeal unless it is one to which objection could be taken under the provisions of O. 47, r. 7, C. P. C. (1). In this

instance the power of review is exercised, the appeal lodged and considered under the Civil Procedure Code and not under the Provincial Insolvency Act. **S. 75.**

Order of the district court in appeal from a subordinate court is final.—Where an order is passed by a court subordinate to a district court and an appeal taken to the district court is decided, the decision of the district court shall be final, subject to the two provisos mentioned in section 75 (1). The first proviso makes the orders of the district court passed in appeal subject to revision by the High Court. The second proviso gives a right of second appeal to the High Court if the decision of the subordinate court was under section 4, *i.e.*, question of title or priority, on any of the grounds on which a second appeal lies under section 100, C. P. C., 1908. We proceed to consider the provisos.

Section 75 (1) ; first Proviso—Under the proviso the High Court has very wide powers of revision. The proviso is worded in almost similar terms as section 25, Provincial Small Causes Courts Act (Act 9 of 1887). Under section 115, Civil Procedure Code also the High Court has certain powers of revision but they are restricted (1). The powers of the High Court under section 75 are wider than those given under section 115, C. P. C., and the High Court can interfere in revision if the order is not according to law (2). It may act *suo moto* or at the instance of any creditor (3). Though there is no restriction on the revisional powers of the High Court under the proviso, the High Courts as a rule do not interfere with a decision of the district judge on a finding of fact unless there are substantial reasons for doing the same (4), or unless the order is perverse or palpably wrong (5). The question as to whether a person made a transfer of his property with intent to defeat or delay his creditors under section 4 (b), P. I. A., 1907, is not one of law but merely one of fact (6). So is the question whether a particular transaction is genuine or not (7). But where the district judge is alleged to have based his order on points which were never raised in the grounds of appeal and in support of which there is no evidence on the record the High Court will interfere (8). It will also interfere where in proceedings under section 53 of the Act, the lower court proceeds on a mistaken view of the law as regards the onus of proof (9). The High Court will not interfere in a matter which was properly within the discretion of the lower court. Where in a pending insolvency application the lower court found that the alleged insolvent had heavy debts to pay, that his accounts were not forthcoming and, after

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- (1) Harparshad v. Darghai Lall, A. I. R. 1932 O. 61 : 135 I. C. 893.
 - (2) Radha Vallabh v. Awa Chit, 141 I. C. 48 : A. I. R. 1933 Nag. 39 ; Abdul Jabar v. Onkarnath, A. I. R. 1936 All 489 : 163 I. C. 831.
 - (3) Jansa Gansa Kalal v. Ram Krishna, A. I. R. 1937 Nag. 31.
 - (4) Sheopratap v. Murlidhar, A. I. R. 1934 Pat. 144 : 148 I. C. 501 ; Baij Nath v. Gajadhar Prashad, A. I. R. 1935 O. 406 : 11 Luck 61 : 154 I. C. 908 ; Harprashad v. Bhagat Singh, 102 P. R. 1916 : 36 I. C. 594 : A. I. R. 1916 Lah. 60 ; Official Receiver, Madura v. Kuppu Swami Chettiar, A. I. R. 1937 Mad. 930.
 - (5) Baij Nath v. Gajadhar supra.
 - (6) Harparshad v. Bhagat Singh supra.
 - (7) Jiwan Ram v. Official Receiver, Ambala, 159 I. C. 866 : A. I. R. 1935 Lah. 708.
 - (8) Gokal Singh v. Krishan Lal, A. I. R. 1934 Lah. 198 : 150 I. C. 80.
 - (9) Subramania Chettiar v. Official Receiver of Madura, 1932 M. W. N. 59 ; Budhamal v. Official Receiver, Lahore, A. I. R. 1930 Lah. 122.

S. 75. considering all the circumstances of the case, appointed an interim receiver in the exercise of the discretion vested in it under section 20, and the order was confirmed by the district court, the High Court refused to interfere (1).

The High Court will not also interfere in revision if there is another remedy open to the aggrieved party. The High Court will refuse to interfere in revision from an order of the official receiver dismissing an insolvency petition because the aggrieved party has a remedy under section 68 (2). It will not also interfere where the order is an appealable one (3). It may be noted that there is a distinction between the powers of revision under the proviso and under section 115, C. P. C. Under section 115, C. P. C., it is expressly provided that a revision lies only when no appeal lies from the order under revision. If an appeal lies from the order the High Court cannot revise it under section 115, C. P. C. Under the proviso the High Court's powers are not restricted by express words on the ground that it shall not exercise those powers if an appeal lies from that order. The second proviso which provides for a second appeal to the High Court from the order of a district court passed in appeal from the order of a subordinate court cannot be read as limiting the scope of the first proviso. Ordinarily, however, the High Court in revision will be guided by the principle underlying section 115, C. P. C. Thus it will not be proper for it to treat an appeal which is expressly prohibited by the Civil Procedure Code, or where an appeal has long become barred by the application of the law of limitation, as a petition in revision and utilise its powers (4). The Lahore High Court however treated an incompetent second appeal as a petition for revision, where the district judge's order was alleged to have been based on points which were never raised in the grounds of appeal and in support of which there was no evidence on the record (5). The same was done in an Allahabad case (6).

The powers of revision of the High Court in the case of orders passed by the district court in its original insolvency jurisdiction stand on a different footing. Revision from such orders is not expressly provided by the section. But the High Court has those powers under section 115, C. P. C., read with section 5 (2). And those powers, it is submitted, cannot be exercised, apart from the express provisions of section 115, C. P. C.

Section 75 (1) ; second proviso ; (second Appeal).—A second appeal in insolvency matters lies only under this proviso. In order that a second appeal may lie from an order of the district judge passed in appeal two conditions are necessary. Firstly, the decision appealed from should be one falling under section 4 of the Act (7) and secondly, any one of the

(1) *Veni Lal v. Vir Chand*, 139 I. C. 44 : A. I. R. 1932 Bom. 228 (it is not clear whether the High Court treated the case as one of revision or second appeal).

(2) *Chidambaram Chetty v. Nagappa Chetty*, 38 Mad. 15, 16 I. C. 820 : A. I. R. 1916 Mad. 1014.

(3) *Milawa Ram v. Kesardas*, 146 I. C. 545. (1) : A. I. R. 1933 Lah. 611 (2).

(4) *Firm Nanak Ram Moti Lal v. Jugal Kishore*, A. I. R. 1935 Pat. 177.

(5) *Gokal Singh v. Krishan Lal*, A. I. R. 1934. Lah. 198 : 150 I. C. 80.

(6) *Rathumal v. Kunj Behari Lal*, A. I. R. 1937 All. 4 ; see also *Vithal Balaji v. Chunnilal Bhawanidas*, A. I. R. 1932 Nag. 33, where a useful discussion of the revisional and appellate powers of the High Court is given.

(7) *John A. David v. Alagappa Chettiar*, 158 I. C. 59 : A. I. R. 1935 Mad. 432.

grounds mentioned in section 100, sub-section (1), C. P. C., should exist. S. 75.
The grounds mentioned in the latter section are :—

(i) the decision is contrary to law or to some usage having the force of law ;

(ii) the decision appealed from fails to determine some material issue of law or usage having the force of law ; and

(iii) there exists substantial error or defect in the procedure provided by the Civil Procedure Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

As to whether any one of the above grounds exist in the case or not, the reader is referred to any commentary on the Code of Civil Procedure. As regards the first condition, it is not always an easy task to decide as to when a particular decision comes under section 4 and there has not been uniformity of opinion on the exact scope of section 4. We proceed to consider decisions where the applicability of section 4 for the purposes of appeals was considered or decided.

It has been held by the Nagpore High Court that an order for additional evidence passed by the district judge on appeal is not final within section 75 (1), and no revision lies under the proviso to section 75 (1) from such an order but under section 5 (2), there being no provision in the Act which says that the interlocutory order is final, the High Court, having power to set aside an interlocutory order passed in a civil suit, has power to set aside an order for additional evidence (1). No appeal from an order refusing to frame a specific issue (2) or an order impleading the legal representatives of the deceased debtor (3) lies on the ground that they are merely interlocutory orders and not decisions.

A decision under sections 53 or 54, Provincial Insolvency Act, does not fall under section 4 and no second appeal lies from an order of the district court passed in appeal from such an order (4). Where a creditor files a petition under section 9 and in order to prove his subsisting debt impeaches a discharge receipt executed by him to the debtor on the ground of fraud, etc., the question does not fall under section 4 and as such no second appeal lies from an appellate order. The reason is that under the section it is necessary that there must have been a contest against the debtor's estate or the general body of the creditors (5). A secured creditor, G, of the insolvent was first allowed by the insolvency court Rs. 500 out of insolvent's charge of rupees one

(1) *Ganga Dhar v. Shri Dhar*, A. I. R. 1921 Nagpore 159 : 61 I. C. 589.
(2) *Balmukand v. Kalyandas*, 152 I. C. 222 : A. I. R. 1934 Lah.

194 (1).
(3) *Wali Mohammad v. Ilijan Lall*, A. I. R. 1936 All. 80. 161 I. C. 311 :

58 All. 639.
(4) *Alagiri Subbanaik v. Official Receiver, Tinnevely*, 54 Mad. 989 : A. I. R. 1931 Mad. 745 : 132 I. C. 641 ; *Chet Ram-Ram Rachhpal v. Atma*, A. I. R. 1933 Lah. 634 : 146 I. C. 490 ; *Ramaswami Nair v. Venkatasami*, A. I. R. 1933 Mad. 653 : 145 I. C. 876 ; *Budhamal v. Official Receiver, Lahore*, A. I. R. 1930 Lah. 122 ; *Ram Chandra v. Ram Chandra*, A. I. R. 1932 Lah. 321 : 137 I. C. 134 I. C. 687 ; *Dina Nath v. Labhu Ram*, A. I. R. 1933 Lah. 242 ; I. C. 55 ; *Tara Chand v. Balkishan*, 151 I. C. 36 : A. I. R. 1933 Lah. 242 ; *Jiwan Ram v. Official Receiver, Ambala*, 159 I. C. 866 : A. I. R. 1935 Lah. 708.

(5) *Gopikabai v. Chapsi Purshotam*, A. I. R. 1935 Bom. 80 : 154 I. C. 566 : 59 Bom. 161.

S. 75. thousand in respect of a share in a house on 26th February, 1932. G put in an objection claiming the whole amount of rupees one thousand. An unsecured creditor opposed this application contending that G was entitled to nothing and the insolvency judge upheld the contention. The district judge on appeal held that no appeal was preferred against the order of 26th February, 1932, and G was entitled to retain rupees five hundred. In second appeal it was held that G having made an application in connection with the order of 26th February, 1932, the whole matter was re-agitated before the insolvency judge and hence it became unnecessary for the unsecured creditor to prefer an appeal to the district judge, that the insolvency judge who passed the order, dated 26th February, 1932, on the application of G, could only be considered to have made it under the provisions of section 151, and the insolvency judge had ample power in the exercise of his inherent jurisdiction to pass such order as was required by justice and the necessities of the case, and was thus competent to set aside the previous order, dated 26th February, 1932 and that as the order passed was under section 151, no appeal lay to the district judge and he had no jurisdiction to modify it (1). On the adjudication of a Hindu father, the receiver obtained an *ex parte* order that the debts were binding on the minor sons. The family property was sold and the purchaser obtained an *ex parte* order for delivery. The minors applied to set aside that order and an application was filed at once for the review of the previous order. The application was dismissed and an appeal therefrom was also dismissed by the district judge holding that it was not competent under Order 47, rule 7. In revision it was held that the application, though purporting to be under Order 47, rule 1, must be deemed to be under section 151, Civil Procedure Code, that the order for delivery passed without notice to the sons was void and the order dismissing the application by the minor sons was the first valid order which was appealable under section 75 of the Provincial Insolvency Act (2). The conflict between these two decisions is obvious. According to the Lahore High Court, there is no appeal to the district court from an order of a subordinate court passed under S. 151, C. P. C., and if the district court entertains an appeal from such an order, a second appeal is competent from the order of the district judge. The Madras view appears to be just opposite. An order by the district court refusing to restore an appeal dismissed in default is covered by the proviso to section 75 (1), and an appeal lies therefrom to the High Court, the ground of the decision being that the matter comes under section 4. Leave to appeal was also granted (3). Where the petition filed by a creditor for adjudicating certain persons as insolvents as members of a joint family with some others already adjudicated was dismissed by the district judge and the creditor appealed, it was held, on an objection to the competency of the appeal, that the order was appealable under section 4, read with section 75 and schedule 1 of the Act. Leave of

(1) Sheo Lal v. Girdhari Lal, A. I. R. 1934 Lah. 177 : 150 I. C. 241.

(2) Raniaraja Nadar v. Chidambaram Nadar, A. I. R. 1933 Mad. 345 : 143 I. C. 613.

(3) Ganga Ram v. Official Receiver, Delhi, A. I. R. 1932 Lah. 248 : 136 I. C. 253.

the court was also presumed to have been given (1). In another case **S. 75.** A, B and C advanced loans to a joint Hindu family firm, secured attachment of the firm property and subsequently obtained decrees on their loans. D who was another creditor of the firm acting solely for himself and in his own interest instituted proceedings in insolvency in the court of the district judge. The district judge made an order of adjudication and appointed a receiver in whom the firm property became vested. A, B and C appealed against the order. It was held that the order fell under S. 4, P. I. A., that it was in effect an order either deciding rights or at any rate deciding priority and that the order was appealable without leave (2). Where an insolvent during the pendency of an application for adjudication transferred certain debts due to him and the official receiver made an application praying that the transferees be directed to refund the amounts realised by them and that the transferees be held personally liable for the entire amounts of the debts transferred to them, it was held that the application fell under section 4 and that a second appeal was competent from an order passed thereon (3). An appeal lies from an order refusing to decide a question of title under section 4 (4). Where the district judge holds that the claim is not maintainable under section 4 in the exercise of original insolvency jurisdiction the order can be appealed against (5). When the district judge relies on section 4 and purports to decide a case under it a second appeal lies under section 75 (1) (6). The question whether the sale by the insolvent is benami falls under section 4 and a second appeal lies (7). If a district judge entertains an appeal which does not lie to his court, a second appeal lies from his decision (8). If an order is passed in a matter within the scope of section 4 the appealability from such a decision does not depend on the view taken by the lower court with regard to the competency of the appeal before it (9). In a Madras case an opinion was expressed that a decision under S. 27, P. I. A., 1920, falls under section 4 (10). The remark was really an *obiter* and its correctness is doubtful. In a Nagpur case it appears to have been held that a decision under section 53 is a decision under section 4 and that a second appeal lies (11). This case cannot be considered as good law in view of a subsequent full bench ruling of the same High Court where the contrary was laid down (12).

(1) Dinajpore Trading & Banking Co., Ltd. v. Provash Chandra Sen, A. I. R. 1933 Cal. 151 : 142 I. C. 484, the district judge was exercising original insolvency jurisdiction.

(2) Kamala Bala Dasi v. Surendra Nath, A. I. R. 1937 Cal. 517.

(3) Gandaram v. Tajdin, A. I. R. 1937 Lah. 913.

(4) Nayan Taradasi v. Sambhunath, A. I. R. 1925 Cal. 932 : 52 Cal. 662 : 89 I. C. 761.

(5) Mono Mohan Roy v. Bhupal Chandra, A. I. R. 1934 Cal. 122 (2) : 149 I. C. 677.

(6) J. N. Mundra v. Nemsai Rajpal & Co., 161 I. C. 981 : A. I. R. 1935 Nag. 246.

(7) Bhagmal v. Kishen Lal Official Receiver, A. I. R. 1937 Lah. 249

(8) See (9) below.

(9) Nachi Muthu Chetty v. Ramakkal, A. I. R. 1933 Mad. 475 : 147 I. C. 494.

(10) K. P. Pera Chand v. P. P. Kuttiali, A. I. R. 1926 Mad. 123 : 91 I. C. 144.

(11) Sheo Lal v. Girdhari Lal, 78 I. C. 140 : A. I. R. 1924 Nag. 351.

(12) Ram Chandra v. Ram Chandra, A. I. R. 1931 Nag. 163 : 134 I. C. 687.

S. 75. No second appeal lies from an order under section 27 extending time during which the debtor is to apply for discharge (1), or any other order under section 25 or 27 (2). A second appeal will not lie from an order granting or refusing discharge (3), or from an order under section 61 on a creditor's application claiming priority for a debt (4). An order of the district court dismissing an appeal against an order of the subordinate court adjudging a person as insolvent is final and no second appeal lies (5). Where section 28 authorises the determination of a question section 4 does not apply and no second appeal lies (6).

The second condition for the maintainability of a second appeal is that the grounds taken in appeal must be any one of those mentioned in S. 100 (1), C. P. C. Where no question of title or priority arises, no second appeal lies to the High Court (7).

Sub-sections (2) and (3).—The first sub-section deals with appeals from decisions, when the insolvency jurisdiction is exercised by a court subordinate to a district court. Sub-sections (2) and (3) provide for appeals from the orders of the district court when it is exercising original insolvency jurisdiction. All orders passed by a district court otherwise than in appeal from an order made by a subordinate court may be divided into two classes :—

(i) decisions or orders specified in schedule 1.

(ii) decisions or orders other than those specified in the first schedule.

Orders mentioned in schedule 1 are appealable to the High Court as a matter of right but other orders are appealable to the High Court only with the leave of the district court or the High Court. The first class of orders falls under sub-section (2), and the second class of orders under sub-section (3).

Sub-section (2).—Orders specified in schedule 1. Section 4 is one of the sections mentioned in the schedule. Where the district court makes some order under section 4, an appeal lies to the High Court (8). We have already noted decisions thereon under the heading 'second appeal,' where we considered the matters which fall under section 4. Section 25 is also mentioned in the schedule. After a notice under section 19 has been issued to the other parties concerned and they have appeared under section 24, the only final order that the court can pass is either to adjudicate the debtor an insolvent or to dismiss the petition. Where the

(1) *Samba Mutthi v. Ramakrishna*, 114 I. C. 847 : A. I. R. 1929 Mad. 48.

(2) *Maung Po Sai v. Bank of Chettinad*, 13 Rang. 717 : 160 I. C. 109 : A. I. R. 1936 Rang. 26.

(3) *Gopal Das v. Official Receiver*, 132 I. C. 526 : A. I. R. 1931 Lah. 64 ; *Gokalsingh v. Krishan Lal*, 150 I. C. 80 : A. I. R. 1934 Lah. 198.

(4) *Mohammadi Begam v. Ahsan Ahsan*, A. I. R. 1937 Lah. 96.

(5) *Allah Diya v. Kunj Behari*, I. R. 1932 Lah. 645 (1).

(6) *Vithal Balaji v. Chunni Lal*, A. I. R. 1935 Nag. 33 : 151 I. C. 242.

(7) *Ghulam Rasul v. Kidanath*, A. I. R. 1934 Lah. 807 (1) : 150 I. C. 305 ; *Fazaludin v. Thakar Singh*, A. I. R. 1933 Lah. 628 : 145 I. C. 337 ; *Radhakrishna v. Official Receiver*, 59 Cal. 1135 : 139 I. C. 323 : A. I. R. 1932 Cal. 642 ; *Sheo Pratan v. Murlidhar*, 148 I. C. 501 : A. I. R. 1934 Pat. 144.

(8) *Kali Charan v. Mohammad Jamil*, A. I. R. 1930 All. 493 : 122 I. C. 762.

court refuses permission to verify the petition and orders the petition to be struck off the register, the order should be deemed to be one of dismissal passed under section 25, and as such it is appealable (1). Where the order is passed under S. 36, P. I. A., 1907, or under section 53 of the present Act, by the district court, an appeal lies, but it is doubtful whether a refusal to act under these sections can be called an order within the meaning of S. 46 (2), P. I. A., 1907 (section 75, sub-section (2), P. I. A., 1920) (2). S. 75.

Sub-section (3); orders appealable with the leave of the court —

Orders of the district court, other than those specified in schedule 1 of the Act, are appealable with the leave of the district court or the leave of the High Court. The jurisdiction of the district court and the High Court in the matter of granting leave to appeal is concurrent. Besides, the granting of leave to appeal is in the absolute discretion of the courts. The section does not specify when and under what circumstances the leave is to be granted. The matter being one of discretion there can be no hard and fast rule for guiding the courts in the matter. The courts have taken a different attitude in different cases with the result that there does not appear to be any uniformity of opinion in the matter. So far as leave is to be obtained from the district court, it is evident that it must be obtained before the appeal is filed to the High Court. Where no application is made to the district court, an application for leave to appeal may be made along with the memorandum of appeal to the High Court and that this should be the ordinary rule, that is, the memorandum of appeal should always be accompanied by a petition for leave to appeal and further that it should be made clear to the judge sitting to receive petitions that the appeal is not presented as one which lies as of right. That it should be the general practice, though not an invariable rule of law, is the opinion of the Allahabad High Court (3). This rule of practice has been enforced by refusing leave to appeal on the ground that no petition for leave was presented with the memorandum of appeal, in a few cases (4). In other cases where the petition for leave was accompanied with the memorandum of appeal or the prayer was made in the memorandum itself, and the appeal was admitted to hearing it was assumed that the petition for leave was granted (5). A very lenient view has been taken in other cases, *i. e.*, the mere fact that the appeal has been admitted to hearing is tantamount to the grant of leave even though there was no application for leave at the time of the presentation of appeal (6). This view has

(1) *Ram Labhaya Mal-Devi Ditta Mal v. Chanchal Singh-Jaswant Singh*, A. I. R. 1932 Lah. 28 : 133 I. C. 626.

(2) *Bhagwant v. Muninkhan*, 6 N. L. R. 146.

(3) *Balli v. Nand Lal*, 33 I. C. 773 : A. I. R. 1916 All. 349.

(4) *Shop Idon Lachhmi Narain v. Bahadur Chand*, 100 I. C. 137 : A. I. R. 1927 Lahore 914.

(5) *Ganesh Das v. Khelanda Ram*, 119 I. C. 753 : A. I. R. 1929 Lahore 636 ; *Ram Chand v. Mohra Shah*, 119 I. C. 427 : A. I. R. 1929 Lah. 622 ; *Kanshi Ram v. Hariram*, A. I. R. 1937 Lah. 87 ; *Sodhi Lall Singh v. Firm Kala Bihari Lal Lashkarmal*, A. I. R. 1937 Lah. 895.

(6) *Dinajpore Trading & Banking Co., Ltd., v. Provash Chandra*, A. I. R. 1933 Cal. 151 : 142 I. C. 484 ; *Lorind Chand Parmanand v. Mahomed Akram Khan*, A. I. R. 1933 Lah. 642 (2) : 145 I. C. 474 : 34 P. L. R. 827 ; *Gopal Ram v. Magni Ram*, 107 I. C. 530 : 7 Patna 375 : A. I. R. 1928 Patna 338.

S. 75. been dissented from and there appears to be a conflict of opinion (1)

It is not necessary that the leave would have been obtained before the appeal is filed. Leave for appeal may be applied for orally or in writing and may be granted at any stage of the appeal proceedings, and the court may go into the facts and hear arguments before it may grant leave (2). Where leave is granted there is no necessity for a further hearing under O. 41, r. 11, C. P. C. (3). The Madras High Court has gone to the length of holding that where the appeal has been preferred within the period of limitation, the application for leave to appeal may be granted even if it is made after the period of limitation for the appeal has expired, and, further, that even if the appeal cannot be deemed to have been filed when the leave is granted the court may under section 78 extend the period for the filing of the appeal (4).

Jurisdiction of the High Court and the district court is concurrent.—In England it has been held that in ordinary cases the application for leave should be made in the first instance to the divisional court and that it should be made immediately after the divisional court has pronounced its judgment (5). No such rule of practice obtains in India. Here leave may be applied for in the first instance to the High Court. Also, as the jurisdiction is concurrent, the High Court may grant leave even where it is refused by the district court (6). In a case the grant of leave by the district judge, where a question of law was involved, was approved (7). In another case where the district judge had refused leave on the ground that there was no question of law involved in the case, the High Court in revision made the observations that the statute does not provide that leave may be granted on questions of fact nor does it provide that the district court should not grant leave on questions of fact and that the question is one of discretion of the district court and that the High Court in revision will not ordinarily interfere with the exercise of that discretion (8). In an English case the following pertinent remarks were made by Lord Esher, M. R., in the course of his judgment:—

(1) *Ghauns v. Gangi Ram*, 132 I. C. 223; *Thakur Singh v. Ganga Singh*, A. I. R. 1927 Lah. 424 (2). 103 I. C. 623.

(2) *Balli v. Nand Lal*, 33 I. C. 773. A. I. R. 1916 All. 319, where this was done but the judges remarked that it should not be allowed to become general, *Radha v. M. C. White*, 73 I. C. 413. 45 All. 364; A. I. R. 1923 All. 466, *Bansidhar v. Kharag Jit*, 26 I. C. 926. A. I. R. 1914 Allahabad 220: 37 All. 65 (in this case the petition for leave was filed with the appeal though no order was passed thereon), *G. H. Gee v. Shub Narain*, 118 I. C. 332: A. I. R. 1929 Pat. 184.

(3) *Madhusudan v. Parbati Sundari*, 29 I. C. 406: A. I. R. 1915 Cal. 774.

(4) *Anantha Narain Ayyar v. Sankaranarayan Ayyar*, 1924, 47 Mad. 673: 79 I. C. 395: A. I. R. 1924 Mad. 345; *Official Receiver, Cuddapah v. Kottarappu Subban*, 105 I. C. 138: 50 Madras 815. A. I. R. 1927 Mad. 869; See also *Ramaswamy v. Power*, 151 I. C. 625: A. I. R. 1934 Rang. 117.

(5) *Re Walker*, 1884, 1 Morr. 249, 250; *Re Maud*, 1891, 8 Morr. 144.

(6) *Jugal Kishore v. Ishar Das*, 63 P. R. 1919: 51 I. C. 695: A. I. R. 1919 Lah. 121; *Madhusudan v. Parbati Sundari*, A. I. R. 1915 Cal. 477 (1): 29 I. C. 406; *Official Receiver, Cuddapah v. Kottarappu Subban*, 50 Mad. 815: 105 I. C. 138: A. I. R. 1927 Mad. 869.

(7) *Arman Sardar v. Sathkira Joint Stock Co., Ltd.*, 18 C. L. J. 564: 20 I. C. 273.

(8) *Shib Jee Shah v. Hiralal Bakhalchand*, 104 I. C. 613: A. I. R. 1928 Patna 23.

"The divisional court refused an application for leave to appeal from their decision but leave to appeal was given by this court. The jurisdiction which the judges of the divisional court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say that they are satisfied that the decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion they ought to refuse leave to appeal in every case" (1).

No appeal lies against an order of a single judge refusing to grant leave to appeal under section 46, clause (iii), Provincial Insolvency Act, 1907, under the Letters Patent, otherwise the very object of directing the party to obtain leave would be frustrated (2).

Leave to appeal to a creditor from an order of the court refusing to set aside a transfer under sections 53 and 54 should not be granted, on the principle underlying section 54A, unless the court is satisfied that the receiver has been requested and he has refused to appeal (3).

Revision from orders of the district court.—The section does not provide that a revision shall lie from orders of the district court. By virtue of section 5, sub-section (2), the High Court can revise the orders of the district court, which are not appealable, under section 115, Civil Procedure Code. An appeal, with the leave of the High Court, lies from every order of the district court. The only case, therefore, where section 115, Civil Procedure Code, might be invoked is where leave to appeal has been refused by both the courts (4). The powers of the High Court under section 115 can be exercised only in cases in which no appeal lies to the High Court. Orders referred to in sub-section (2) are, therefore, not revisable under section 115. Orders referred to in sub-section (3) are not revisable unless the High Court has refused leave to appeal from such an order (5). The impression which the Indian decisions on the grant of leave to appeal under sub-section (3) leave in one's mind is that leave has never been refused where the judges wanted to interfere with the lower court's order. It is easier for the High Court to interfere on larger grounds in an appeal than in a revision under section 115, Civil Procedure Code. There are, therefore, very remote chances of the High Court entertaining a revisional application under that section in a case, when it has refused leave to appeal.

Appeals to Privy Council.—By the provisions of sections 46 and 47, P. I. A., 1907 (now section 75), it was not intended to interfere with any right of appeal to the Privy Council that might otherwise exist, (6). Appeals from orders of the courts passed by them in their insolvency jurisdiction shall be governed by the Code of Civil Procedure and the rules

(1) *Ex parte* Gilchrist, 1886, 17 Q. B. D. 521, 527-528.

(2) Mahadev Aiyar v. Muthiar Chettyar, 38 I. C. 818 : A. I. R. 1918 Mad. 1070.

(3) Puran Chand v. Ram Chandra Gupta, 132 I. C. 539 : A. I. R. 1931 Loh. 651.

(4) Maung Po Mya v. Maung Po Kyin, 8 B. L. T. 282 : 30 I. C. 943 : A. I. R. 1915 L. B. 80.

(5) See Chandra Nath Sen v. Nagindra Nath Ganguli, 107 I. C. 467 : A. I. R. 1928 Cal. 263 (2).

(6) Official Receiver, Madura v. Kuppu Swami Chettiar, A. I. R. 1937 Mad. 930.

S. 75. made by His Majesty in Council regarding appeals from the courts in British India (1). Accordingly it has been held that an appeal lies to the Privy Council from an order of the High Court passed on appeal from an order of the district judge (2). Similarly a judgment under section 8, Presidency towns Insolvency Act, by the High Court in its appellate jurisdiction setting aside or annulling a prior order is appealable under clause 39 of the Letters Patent to the Privy Council (3).

Appeal to wrong court—Where an appeal which should have been filed in the district court is filed in the High Court owing to a *bona fide* mistake, the High Court may return the memorandum of appeal to be presented to the district court, but not if the mistake was not *bona fide*. In the latter case, the appeal should be dismissed, leaving it to the party to file an appeal in the proper court (4).

Parties to appeal and procedure in appeal—The general rule of procedure is that notice of appeal should be given to all those persons who are directly affected by the appeal (5). When in insolvency the official receiver sold certain lands of the insolvent, the latter objected to the confirmation of the sale, and the sale having been unsuccessful he preferred an appeal, it was held that the purchaser of the property was a necessary party to the appeal (6). And if they are impleaded beyond the period of limitation, the appeal not only as against them but against the other parties as well will be time-barred (7). A receiver is not a necessary party to an appeal in which the very order of adjudication (as a consequence of which a receiver was appointed) is in question and this has been a uniform practice in the Punjab Chief Court and the Lahore High Court (8). Where a person is adjudged insolvent on the application of two creditors and on the failure of the official receiver to apply for annulling a mortgage executed by an insolvent, the above creditors apply for the same and get the mortgage annulled, both creditors and the official receiver are necessary parties to the appeal filed by the mortgagee. Even if the official receiver alone had been impleaded, the creditors would not have been a necessary party. In the absence of both, however, the appeal is incompetent (9). The fact that notice upon the heir of a deceased scheduled creditor has not been given would not by itself render the proceedings before the appellate court incompetent (10), nor such a

(1) *Chattarpal Singh Dugar v. Kharag Singh Lachmi Ram*, 17 C. W. N. 752 : 17 C. L. J. 547 : 40 Cal. 685.

(2) *Maung Ba Thaw v. Ma Pin*, A. I. R. 1934 Privy Council 81 : 61 I. A. 158 : 12 R. 194 : 148 I. C. 1.

(3) *Annamalai Chetty v. Official Assignee*, A. I. R. 1925 Mad. 243 : 91 I. C. 126.

(4) *Chattui Bhuj v. Har Lal*, 80 I. C. 858 : A. I. R. 1925 Cal. 335.

(5) *Trasi Deva Rao v. Parameshwara*, 39 Mad. 74 : 27 I. C. 144 : A. I. R. 9115 Mad. 1053 ; see also *In re A. Debtor*, 1901, 2 K. B. 354.

(6) *Ram Karan v. The Official Receiver*, Ferozepore, 121 I. C. 373 : 31 P. L. R. 18.

(7) *Khaira v. Salem Raj*, 51 I. C. 935 : A. I. R. 1919 Lah. 3 (1).

(8) *Moti Ram-Prem Chand v. Kewalram-Dharamchand*, 105 I. C. 569 : A. I. R. 1928 Lah. 202.

(9) *Ghulam Sharaf v. Lachhman Das*, A. I. R. 1934 Lah. 36 (1) : 148 I. C. 329.

(10) *Gokal Chandra v. Radha Govind*, 97 I. C. 1013 : A. I. R. 1926 Cal. 1210 (obiter).

creditor's death pending the appeal and failure to bring the legal representatives on the record within the time fixed by the law will cause the appeal to abate (1). **S. 75.**

Miscellaneous.—A variation of an order under section 75, P. I. A., is not a variation of a decree within the terms of section 144, C. P. C., and section 144, C. P. C., is not exhaustive of the powers of the court to grant restitution and section 151, C. P. C., saves the inherent power of the court to make such orders as may be necessary for the ends of justice. When an order has been duly issued, and a party is apprised of the order, time will run from that date, even though it is directed that a notice of an order shall be sent and even though no formal notice was conveyed to him or her (3). In an appeal from an order holding a person insolvent, one creditor contended that no notice was served on certain other creditors. It was, however, admitted that a notice was issued to him and also published in the Gazette, but it was found that the creditor was dead on the date he was said to have received the notice. It was held that this was a mere irregularity and did not affect the case between the insolvent and the appellant creditor (4).

1) *Thakur Singh v. Ganga Singh*, 103 I. C. 623 : A. I. R. 1927 Lah. 424 2).

(2) *Goginini Ankaamma v. Alluri Sri Venkata Seshachalapatty*, A. I. R. 1935 Mad. 783 : 160 I. C. 381.

(3) *Vedariathi v. S. Sadasiva Rao*, A. I. R. 1935 Mad. 149 : 57 Mad. 1030 : 153 I. C. 167.

(4) *Basdeo Prasad v. Baiju Mandal*, A. I. R. 1937 Pat. 671.

PART VII.

MISCELLANEOUS.

- s. 76.** **76.** The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.

History.—This reproduces section 49 of the Act III of 1907.

Analogous law.—Section 90, sub-section (2), P-t. I. A., is as follows :—

“Subject to the provisions of this Act and rules, the costs of and incidental to any proceedings in the court shall be in the discretion of the Court.

Section 109 (1), B. A. of 1914, is as follows :—

“Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in court under this Act shall be in the discretion of the court. Provided that, where any issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such issue is tried otherwise orders.”

Rules under the Act.—Nearly all the High Courts have framed rules under section 79. See for insolvency rules on costs Calcutta rules 31, 32, Bombay rule 27 and Allahabad rules 35 to 37. Under rules framed by the Oudh Chief Court, the costs of publication under section 30 are to be recovered from the insolvent's property, if the property is sufficient or, to remit the costs, if the property is insufficient. Failure to pay costs cannot be made a ground for annulling an order of adjudication (1). Under rules framed by the Calcutta, Bombay and Allahabad Courts, all proceedings under the Act down to and including the making of an order of adjudication shall be at the costs of the party prosecuting the same, but when an order of adjudication has been made the reasonable costs for the petitioning creditor shall be payable out of the estate ; and also no costs incurred by a debtor or incidental to an application to approve of a composition or scheme, shall be allowed out of the estate, if the court refuses to allow the composition or scheme.

Rules have been framed under the Bankruptcy Act, 1914, as well. They are much more explicit and are likely to serve as a useful guide to the Indian courts for exercising the discretion conferred by the section. A few important rules under that Act are given here.

1. The court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and

(1) *Har Kishore v. Masumali Khan*, A. I. R. 1980 Od. 53 : 5 Luck. 479 ; 124 I. C. 368.

party or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the Court may fix a sum to be paid in lieu of taxed costs. **S. 76.**

(2) In the absence of any express direction costs of an opposed motion shall follow the event and shall be taxed as between party and party.

(3) Where an action is brought against an Official Receiver or trustee in bankruptcy as representing the estate of the debtor, or where an Official Receiver or trustee in bankruptcy is made a party to a cause or matter, on the application of any other party thereto, he shall not be personally liable for costs unless the Court otherwise directs.

106. When a bill of costs is taxed under any special order of the Court, and it appears by such order that the costs are to be paid otherwise than out of the estate of bankrupt, the taxing officer shall specially note upon the allocatur, by whom, or the manner in which such costs are to be paid.

117. The assets in every matter remaining, after payment of the actual expenses incurred in realising any of the assets of the debtor, shall, subject to any order of the Court, be liable to the following payments, which shall be made in the following order of priority, namely :—

First. The actual expenses incurred by the Official Receiver in protecting the property or assets of the debtor or any part thereof, and any expenses or outlay incurred by him or by his authority in carrying on the business of the debtor :

Next. The fees, percentages, and charges payable under the table B. of the Scale of Fees ; and any other fees payable to, or costs, charges, and expenses incurred, or authorised by, the Official Receiver :

" The fee which, under the Scale of Fees for the time being in force, is required to be affixed to the copy of the Cash Book when forwarded for audit :

" The deposit or deposits lodged by the petitioning creditor pursuant to these Rules :

" The deposit or deposits lodged on any application for the appointment of an Interim Receiver :

" The remuneration of the special manager (if any) :

" The taxed costs of the petitioner :

" The remuneration and charges of the person (if any) appointed to assist the debtor in the preparation of the statement of his affairs :

" Any allowance made to the debtor by the Official Receiver :

" The taxed charges of any shorthand writer appointed by the Court :

" The trustee's necessary disbursements other than actual expenses of realisation heretofore provided for :

" The costs of any person properly employed by the trustee with the sanction of the committee of inspection :

" Any allowance made to the debtor by the trustee with the sanction of the committee of inspection :

" The remuneration of the trustee :

S 76. Next. The actual out-of-pocket expenses necessarily incurred by the committee of inspection subject to the approval of the Board of Trade.

119. In any case in which, after a bankruptcy petition has been presented by a creditor against a debtor and before the hearing of such petition, the debtor files a petition, and a receiving order is made on the petition of the debtor, unless in the opinion of the Court the estate has benefitted thereby, or there are special circumstances which make it just that such costs shall be allowed, no costs shall be allowed to the debtor or his solicitor out of the estate.

120. In the case of a bankruptcy petition against a partnership, the costs payable out of the estates incurred up to and inclusive of the receiving order shall be apportioned between the joint and separate estates in such proportions as the Official Receiver may in his discretion determine.

121.—(1) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the Official Receiver may pay or direct the trustee to pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as in his discretion the Official Receiver may think fit. The Official Receiver may also, as in his discretion he may think fit, pay or direct the trustee to pay any costs or charges properly incurred, prior to the appointment of the trustee, for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate.

(2) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee, with such consent as is hereinafter mentioned, may pay such costs or charges out of the separate estates of such co-debtors or one or more of them. The trustee, with the said consent, may also pay any costs or charges properly incurred, for any separate estate, after his appointment, out of the joint estate, and any part of the costs or charges of the joint estate incurred after his appointment which affects any separate estate out of that separate estate. No payment under this Rule shall be made out of a separate estate or joint estate by a trustee without the consent of the committee of inspection of the estate out of which the payment is intended to be made, or, if such committee withhold or refuse their consent, without an order of the Court.

Scope.—The provisions of section 76 are not mandatory. There is no prohibition to a court exercising its discretion in the matter of costs and in the exercise of that discretion, applying the provisions of S. 35A, C. P. C., to such cases as it deems fit for that application (1).

"Court."—The Official Assignee cannot be regarded as a "Court" while enquiring into claims made against the estate of an insolvent pending the insolvency and so the insolvency court has no jurisdiction to award the costs of and incidental to such enquiry (2)

(1) *Baijnath v. Motilal*, 158 I. C. 394 : 31 N. L. R. 365 : A. I. R. 1935 Nag. 207.

(2) *Morarji Jairam Narainji, in re*, 139 I. C. 687 : A. I. R. 1932 Bom. 569.

77. All Courts having jurisdiction in insolvency **S. 77.**
 and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

Courts to be auxiliary to each other.

History.—This is section 50 of the Act III of 1907.

Analogous law.—It is provided by S. 26, P-t. I. A. that all courts having jurisdiction under the Act shall make such orders and do such things as may be necessary to give effect to section 118 of the Bankruptcy Act, 1883, and to section 50 of the Provincial Insolvency Act, 1907.

Section 118 of the Bankruptcy Act, 1883, is now replaced by section 122 of the Bankruptcy Act, 1914. It runs as follows :—

“The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.”

It is to be noted that the above section enjoins upon every British Court elsewhere having jurisdiction in bankruptcy or insolvency to aid the bankruptcy courts of England. The British Act is an Imperial Act and as such the section applies to British Indian Courts also.

It appears that there is a similar provision embodying the principle underlying the present section in U. S. A. It has been ruled there that where a corporation or an individual has been adjudicated a bankrupt in a district court, a district court in another district has power to compel the delivery of the property within its jurisdiction belonging to the bankrupt to the trustee in bankruptcy, because the courts are bound to act in aid of the proceedings in the original court (1).

Scope.—The word ‘courts’ in the section means courts having jurisdiction in British India. The reason is that the Provincial Insolvency Act, being an Act of the Indian legislature, is binding only on the courts of the territories for which the Indian legislature can make laws. The Presidency-towns Insolvency Act is also an Act of the Indian legislature and the operation of S. 126, P-t. I. A. (corresponding to the present

(1) *Habbittat v. Dutcher*, 216 U. S. 102; *In re Elkuns*, 216 U. S. 125; *In re Wood*, 210 U. S. 246, cited in Ghosh's Provincial Insolvency Act, 10th edition at page 575,

S. 77. section), is similarly limited. The Indian Insolvent Act 1848, which was repealed by the Presidency towns Insolvency Act, was an imperial statute and operated throughout the British dominions. Courts outside British India are not, therefore, bound to act in co-operation with the courts of British India, by virtue of the statutory provision in the Indian Acts, though on general principles of private international law, they may so act. Closely connected with this question is the question of the vesting of properties in foreign territories under an order of adjudication passed by a British Indian Court. That question has been fully discussed under section 1.

The section is confined in its scope only to courts exercising insolvency jurisdiction and not to other courts (1). Again, under the section no court has power to refer a matter over which it has full jurisdiction to another court. The section is enacted to enable one court to assist another in dealing with matters which are within the jurisdiction of the court asked to act, but not to enable it to send a matter proper to be dealt with by the requesting court for trial to another court (2).

Object.—The object of the section is to avoid conflict of jurisdictions and make the administration of insolvency effective. It is settled law that, notwithstanding prior orders of adjudication, a court has jurisdiction to make orders of adjudication on a petition presented to it (3). Thus it has been held that a court is competent to make an adjudicating order when there are large assets within its jurisdiction, even though the debtor has been already adjudicated in England (4). Apart from the question of jurisdiction, there may be cases where more than one adjudicating orders are passed against the same debtor by more than one court in ignorance of the fact of the proceedings in the other court. In all such cases it is desirable that the proceedings should continue with co-operation by the different courts.

Request to another court.—In order that the other court may be able to act at the request of the insolvency court, it is necessary that not only there should be an order of the court seeking aid but also there should be a request specifying the nature of aid sought for (5).

Orders in aid ; nature of aid which can be asked for.—In a few cases the courts have asked for the aid of another court. Thus the English court of bankruptcy may, on the adjudication of a British subject in England, make an order under section 122 of the Bankruptcy Act, 1914, seeking aid of the High Court of Calcutta in its insolvency jurisdiction with a request to the latter court to direct the official assignee of Calcutta to deliver to the official receiver the assets of the bankrupt which came into his hands in the bankrupt's subsequent insolvency in Calcutta (6). In the case last cited, the trustee in the English bankruptcy denied the jurisdiction of the Calcutta Court and claimed the assets free from any commission or charges of the Calcutta official

(1) *Callender Sykes & Co v. Colonial Secretary*, 1891, A. C. 460.

(2) *Re Huntly, exp. Goldstein*, 1917, 2 K. B. 729.

(3) *Ex parte Robinson*, 1883, L. R. 22 Ch. D. 816; *Ex parte McCulloch*, 1880, L. R. 14 Ch. D. 716; *In re Artola Hermano*, 1890, L. R. 24 Q. B. D. 640; *In re Aranvayal Sabhapathy Moodliar*, 1897, I. L. R. 21 Bom. 297, 307.

(4) In the matter of William Watson, 31 Cal. 361 (Indian Insolvency Act).

(5) *Re L. King & Co.*, 1911, 38 Cal. 452.

(6) In the matter of William Watson, 1904, 31 Cal. 761.

assignee and the application was, mainly on the ground of the trustee's attitude, refused. Where a firm filed their petition in insolvency in Bombay at a time when one of the partners, M, was at Shanghai and M subsequently swore his petition at Shanghai, it was held by the Bombay High Court, in a case under the Indian Insolvency Act, that the property of the insolvent debtor's firm in Shanghai vested in the official assignee of the insolvent debtor's court at Bombay, and that the court could order M to hand over such property to the official assignee in Bombay. It was further held that the insolvent debtor's court at Bombay could order the examination of a witness at Shanghai, though it could not direct a witness to come to Bombay to be examined, there being no machinery for the purpose (1).

In another Calcutta case, the High Court of Calcutta made an order requesting the district court of Delhi to act under section 77 of the Provincial Insolvency Act and to make over to the Calcutta Court the property of the insolvent in the custody of the Delhi Court (2). Where the insolvency proceedings were proceeding in the Dacca Court, an application was made for setting aside a transfer under S. 36, P. I. A., 1907, in respect of a property situate in Bhagalpore, it was held that the Dacca Court could deal with the question of the validity of the transfer, even though the property was situated outside its limits, and the proper course for the Dacca Court was to transmit the petition under S. 50, P. I. A., 1907 (corresponding to the present section), to the court at Bhagalpore to take evidence and transmit its finding to the former, which would then deal with the proceedings (3).

Where some of the partners of a firm had filed their petition in insolvency in Calcutta and others had been adjudicated bankrupts in England and in the insolvency proceedings in Calcutta an order had been made that such proceedings should be in aid of and auxiliary to the bankruptcy proceedings, it was held that the trustee in bankruptcy and official receiver had no *locus standi* to oppose the personal discharge of the insolvents, who had filed their petition in the Calcutta Court (4). The Court in England can, however, make an order for the public examination of the insolvents, but there should be an express order to that effect by the English Court and not only a general order seeking aid (5). The procedure for holding such a public examination will be that the court in India will appoint a commissioner upon a petition in the ordinary way to take the evidence for transmission to the English Court (6).

78. (1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 1 shall be deemed to be a decree.

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limi-

(1) *In re Naoroji Soarabji Talati*, 33 Bom. 462.

(2) *In re Jiwan Das Jhavar*, 1913, 40 Cal. 78 : 18 I. C. 908.

(3) *Lal Ji Sahay Singh v. Abdul Gani*, 7 I. C. 765 : 12 C. L. J. 462.

(4) *Re L. King Co.*, 1911, 38 Cal. 542 : 12 I. C. 14.

(5) *In the matter of Issac Shrager*, 33 Cal. 1062.

(6) *In the matter of Issac Shrager*, 33 Cal. 1062.

- S. 78. tation prescribed for any suit or application for the execution of a decree (other than a suit or application, in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

History.—This section is new. The Act III of 1907 did not contain any such provision. The question arose as to whether the general provisions of the Indian Limitation Act could be applied to appeals and applications under the Provincial Insolvency Act. The general provisions of the Limitation Act are based on considerations of justice and convenience to prevent hardship. The Provincial Insolvency Act was silent. It did not expressly prohibit the application of the general provisions of the Indian Limitation Act. The difficulty in so doing, however, arose from the wording of section 29, sub-section (1) (b), before it was amended by Act 10 of 1922. The above provision ran as follows :—

“Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereinafter in force in British India.

According to one view, which was taken by the Madras High Court, the Provincial Insolvency Act was held to be a special law so as to be affected or altered by the application of the general provisions of the Indian Limitation Act within the meaning of section 29 (1) (b), Indian Limitation Act (1). According to the other view, which was taken by the Allahabad High Court, the Provincial Insolvency Act was a special law, but by applying the general provisions of the Act it was not altered or affected within the meaning of section 29 (1) (b) (2). The Allahabad view was followed by the Lahore Chief Court (3). Sub-section (1) of the present section now sets at rest the above conflict. In view of the present section it is not now necessary to examine the reasoning adopted by the different High Courts for holding different views. Under the present Act as well, the question of the applicability of sections other than sections 5 and 12 may arise. We will consider it under a subsequent heading.

Sub-section (2) provides for the exclusion of the period between an order of adjudication and its annulment in computing the period of limitation prescribed for any suit or application for the execution of a decree. Under the old act, as it is under the present Act, no creditor could pursue

(1) *Lingayya v. Chinna*, 41 Mad. 169 F. B.; A. I. R. 1918 Mad. 213; 44 I.C. 805; *Sivaramayya v. Bhujanga*, 1916, 39 Mad. 593; 30 I. C. 703; A. I. R. 1916 Mad. 376; *Ramaswami v. Venkateswara*, 1919, 42 Mad. 13; 48 I. C. 952; A. I. R. 1919 Mad. 947.

(2) *Dropadi v. Hiralal*, 16 I. C. 149; 34 All. 496 F. B.; *Thakur Prasad v. Panno Lal*, 1913, 35 All. 410; 20 I. C. 673.

(3) *Ram Kishan v. Umraobibi*, 33 I. C. 730; A. I. R. 1916 Lah. 307. See also the obiter remarks in *Nur Mohammad v. Lal Chand*, 90 I. C. 254; A. I. R. 1925 Lah. 436.

his remedy by suit or execution of decree against the insolvent or his estate in the ordinary courts after the order of adjudication without the leave of the court. In cases where the adjudication was subsequently annulled the creditors had again to resort to the ordinary courts and there the general provisions of the Indian Limitation Act were held applicable to their claims. One of these is section 9 which provides that where once time has begun to run, no subsequent disability or inability stops it from running (1). The insolvency of the defendant or the judgment-debtor was not held to be a disability or inability within the meaning of section 9, I. L. A.; nor section 15, Indian Limitation Act, could be invoked in aid because the bar created by section 28 (2) (Sec. 16 (1), P. L. A., 1907) was not an absolute bar (2). The same difficulty arose as regards applications for execution of decrees. To remove this the legislature intervened and enacted sub-section (2). The benefit of the sub-section is however given only to a creditor who proves his debt in insolvency. The object of the proviso is to protect the diligent creditors only. Unless the creditor comes in insolvency, it cannot be said that his claim became barred by time because of the insolvency proceedings and neither justice nor equity requires that such a person should be allowed to exclude the period spent in insolvency proceedings.

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(1).

Analogous law.—Section 90, P-t. I. A., deals with the procedure and powers of the court. By its sub-section (5), it is provided that where by the Act or any rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the court thinks fit to impose. This sub-section corresponds to sub-section (4), section 169, B. A., 1914. Under the Presidency-towns Insolvency Act, therefore, no difficulty arises in regard to limitation for appeals or applications provided for in that Act. There is, however, no provision in that Act similar to section 78 (2) and the insertion of such a provision has been suggested (3).

Retrospective effect.—Section 78 relates merely to procedure and not to any substantive right. Where, therefore, an application for leave to appeal was made after the Act in insolvency proceedings commenced under Act III of 1907, delay in filing the application was excused under section 5, Indian Limitation Act (4). Where an application by a creditor to adjudicate the debtor an insolvent was made statedly under the Act of 1907 and which was time-barred at that date under the old Act, it was held that the mere fact that it was pending for disposal when the new Act came into force would not revive the right which was already time-barred (5).

Sub-section (1).—By the sub-section, sections 5 and 12 of the Indian Limitation Act have been made applicable to appeals and applications under the Act.

(1) See also *Re Benzon*, 1914, 2 Ch. 68.

(2) *Sidhraj Bhojraj v. Alli Haji*, A. I. R. 1923 Bom. 33 (2) : 67 I. C. 757 : 47 Bom. 244. (a case under P-t. I. A., under which the law is the same as it was under the Act III of 1907.)

(3) *Karthian Chettiar v. Raman Chetty*, 80 I. C. 376 : A. I. R. 1924 Mad. 400 (1).

(4) *Currimbai v. Ahmed Ali*, 58 Bom. 505 : 143 I. C. 698 : A. I. R. 1933 Bom. 91.

(5) *Hanmayya v. Rāmāyā*, 64 I. C. 270 : A. I. R. 1921 Madras 272 (1).

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(1).

Section 5 of the Indian Limitation Act runs as follows :—

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or the applicant satisfies the court that he has sufficient cause for not preferring the appeal or making the application within such period.

Explanation—The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be a sufficient cause within the meaning of this section."

Section 12 stands as follows :—

"12. (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed the time requisite for obtaining the copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award the time requisite for obtaining a copy of the award shall be excluded."

Under the Act III of 1907 it was held in some cases that sections 5 and 12 of the Indian Limitation Act did not apply to applications or appeals under the Indian Insolvency Act (1). In a few other cases the contrary view was taken (2). So far as the applicability of sections 5 and 12 to appeals and applications under the Act is concerned, there is no longer any difficulty which has been removed by the enactment of the present sub-section. Under the present Act these sections have been held applicable (3).

(1) *M. Durai Swami Ayangar v. Meerakshi Sundra Iyer*, 25 I. C. 610 : A. I. R. 1915 Mad. 361 (1) (S. 12 & I. L. A. was not applied to an application under section 22, P. I. A.); *Langayya v. Chinna*, 41 Mad. 169 : 44 I. C. 805 : A. I. R. 1918 Mad. 213 (sections 5 and 12, I. L. A., were held inapplicable to proceedings under the Provincial Insolvency Act, including a petition for insolvency); *Jugal Kishore v. Gur Narain*, 9 A. I. J. 838 : 11 I. C. 197 : 33 All. 738. (section 12 was not applied to an appeal under the Act), subsequently overruled by a Full Bench of the same High Court, reported as *Dropadi v. Hira Lal*, 34 All. 496.

(2) *Warvram Singh v. Wadhawa*, 89 P. R. 1918, 46 I. C. 588 : A. I. R. 1918 Lah. 372 (2) (section 5 was applied to an appeal under section 46, P. I. A., 1907); *Dropadi v. Hira Lal*, 34 All. 496 : 16 I. C. 149 (the general provisions of the Limitation Act were held to be applicable to insolvency proceedings).

(3) *Anantha Narayana Aiyar v. Rama Subba Aiyar*, 79 I. C. 395 : 47 Mad. 678 : A. I. R. 1924 Mad. 345; *Nur Mohommad v. Lal Chand*, 93 I. C. 254; *Sivaramayya v. Bhujanga*, 39 Mad. 593 : A. I. R. 1916 Mad. 376 : 30 I. C. 708 (section 12, I. L. A., was not applied to an appeal to the High Court from the district judge's order).

Applicability of other provisions of the Indian Limitation Act to proceedings under the Act.—We have stated already under a previous heading that the conflict in regard to the extension of limitation for proceedings under the Act depended upon the interpretation of section 29, I. L. A. The conflict was not confined to sections 5 and 12, I. L. A. only, but it extended to all the general provisions (including sections 4, and 14, Indian Limitation Act). In a Madras case, it was held that section 14 of the Limitation Act could not be so applied as to extend the period of time for filing a petition in the proper court by excluding the period which had been spent in conducting it in a court not having jurisdiction (1). This was before section 29 was amended in 1922. Section 78 of the present Act was also enacted at a time when section 29 was not amended. In enacting the present section the legislature appears to have accepted at that time the view that section 29 could not be invoked for applying the general provisions of the Indian Limitation Act to proceedings under the Provincial Insolvency Act and that it thought it desirable to make special provision in the Act itself. That explains why the Legislature only mentioned those sections of the Indian Limitation Act, which it wanted to be applied to insolvency proceedings and did not exclude specifically the applicability of other general provisions of the Indian Limitation Act. After the present section had been enacted the legislature amended section 29, I. L. A., in the manner indicated in a previous paragraph. Now sections 4, 9 to 18, and section 22 apply to suits, appeals or applications under special or local laws in so far as and to the extent to which they are not expressly excluded by such special or local laws. The necessity for enacting section 78, sub-section 1 disappeared by the subsequent amendment of section 29, Indian Limitation Act. Following the wording of the amended section, it has been held that section 4 of the Indian Limitation Act applies to an application under section 68 of the Provincial Insolvency Act, so that if the last date of application happens to be a Sunday it may be presented on the next day (2).

Does section 78, sub-section (1) or section 10, General Clauses Act apply to petitions under sections 9, 53 and 54.—The subject has been fully discussed under section 9 *ante*.

Sub-section 2; exclusion of period between order of adjudication and its annulment.—In order that a person may be entitled to the benefit of the sub-section, it is necessary that the following conditions should be satisfied :—

(i) The person against whom the suit is to be brought must have been adjudicated insolvent.

(ii) The suit or application, time for which is sought to be extended, could have been brought or made but for the making of an order of adjudication under this Act.

(iii) No leave of the court must have been obtained under sub-section (2) of section 28.

(1) Trasi Deva Rao v. Parmeshwaraya, A. I. R. 1915 Mad. 1053 : 39 Mad. 74 : 27 I. C. 144.

(2) Mathan Mav v. Bailiff of the Township Court of Kvaunggov, 9 Rang. 150 ; 134 I. C. 223 : A. I. R. 1931 Rang. 209.

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(2).

(iv) The order of adjudication must have been annulled at the time the suit is brought or an application for the execution of a decree is made.

(v) The suit or application must be in respect of a debt which was proved under this Act in the insolvency proceedings.

An order of adjudication under the Act is necessary.—An order of adjudication is necessary because without an order of adjudication there is no bar for any person to prosecuting his remedy in the ordinary course of law. It is only when bankruptcy ensues that there is an end to the operation of the statute of limitation, with reference to debtor and creditor, the debtor's rights are established and the creditor's rights are established in the bankruptcy and that the statute has no application at all to such a case or the principles by which it is governed (1). Again, it is to be noted that the order of adjudication must have been passed under the Provincial Insolvency Act. Where the proceedings take place under the Presidency-towns Insolvency Act, the section has no application.

(ii) In order that the sub-section may apply, it is necessary that the order of adjudication must have prevented the person from bringing his suit, etc., in the ordinary course. The reason is that unless the order of adjudication has that effect, the very basis of the provision is gone. The section has, therefore, no application where it is the creditors or decree-holders who are adjudicated insolvent and who after the order of annulment institute a suit or file an application for execution (2). The sub-section will not also apply in respect of causes of action or debts or choses in action which are not provable in insolvency or which do not vest in the receiver on adjudication.

(iii) The sub-section does not apply where the leave of the court is obtained under section 28 (2), the effect of which is to remove the bar created by the order of adjudication. It will not apply where the permission to execute a decree under section 28 (2), though obtained, is one that is ineffectual and on which it was in the circumstances impossible to act (3).

Annulment of adjudication.—The expression 'annulment of adjudication' has not been defined in the Act. It has been held by the Nagpore High Court that the order of adjudication, which is subsequently annulled, must be a valid order. Where, therefore, an order of adjudication was passed by the lower court but it was set aside in appeal, it held that the period between the order of adjudication by the lower court and the order of setting it aside by the appellate court could not be excluded either under section 28 (2), or under section 78 (2), as there was no valid order of adjudication (4). In very similar circum-

(1) See the observations of Bacon C. J., in *Erparte Lancaster Banking Corporation, in re West*, 10 Ch. D. 776.

(2) *Rama Pillai v. Kasamuthu Nadar*, 121 I. C. 485 : A. I. R. 1929 Mad. 715; *Muttayya Chettiar v. Periatambi Tevan*, A. I. R. 1931 Mad. 784 : 135 I. C. 315.

(3) *Mul Chand v. Raj Dhar*, 88 I. C. 544 : A. I. R. 1925 All. 735, facts somewhat peculiar.

(4) *Bali Ram v. Supadasa*, A. I. R. 1931 Nag. 109 : 121 I. C. 55.

stances the Lahore High Court applied the sub-section in a case (1). **S. 78**
The Lahore view has been followed by the Calcutta High Court (2). **(2).**

The adjudication must have been annulled before the suit is brought or the execution application is made. Where the suit or application is brought or made during the pendency of the insolvency proceedings but before the order of adjudication is annulled the section will have no application (3). In such cases where the creditor sues when the ordinary period of limitation is over but before the order of adjudication is annulled, the proper course is not to dismiss the suit but to permit him to withdraw it with liberty to sue again after annulment of adjudication (4).

Provable but not proved under this Act.—Section 49 only specifies a simple mode of proof of a debt but does not exclude any other mode of proof (5). A more strict view appears to have been taken by the Lahore High Court in the matter of mode of proof. It has held that in order to claim the benefit of the sub-section the creditor must show that the insolvency judge either passed a formal order under section 33 or that there were proceedings which, by necessary implication, were tantamount to such an order (6). In the Lahore case the plaintiff had received more than one dividend from the insolvency court and he was even then not given the benefit of the sub-section. In other cases, including the Lahore High Court, the expression 'proved' has been interpreted in a very wide and, it is submitted with respect, in a rather loose sense. Where a decree that the creditor sought to execute was obtained subsequent to the insolvent's adjudication not only against the insolvent but also against the official receiver, who was impleaded as a party, the debt in respect of which the decree was obtained was held to be proved (7). Where the debt to the decree-holder was proved in the insolvency proceedings according to the statement of the insolvent that a decree had been obtained against him, the debt was taken to have been proved within the proviso to section 78 (8). Where a creditor had done all that was necessary to prove his debt, it was assumed, in the absence of a decision by the receiver refusing to admit the debt, that the debt was proved within the meaning of the sub-section though the official receiver by inadvertence omitted to mention the debt in the schedule (9). For the purposes of the section a person shall be considered to have

(1) *Amar Singh v. Imperial Bank of India*, Jullundur, 14 Lah. 426 : 145 I. C. 686 : A. I. R. 1933 Lah. 958.

(2) *Charu Chandra v. Ramesh Chander*, A. I. R. 1937 Cal. 158.

(3) *Rama Pillai v. Kasamuthu Nadar*, 121 I. C. 485 : A. I. R. 1929 Mad. 715 ; *Machanjuri Ahmed v. Govind Prabhu*, 114 I. C. 227 : 51 Mad. 862 : A. I. R. 1928 Mad. 977 ; *Bandeally Jaffer v. Peer Mahomed*, 146 I. C. 121 : A. I. R. 1933 Rang. 75.

(4) *Machanjuri Ahmed v. Gobind Prabhu* supra ; *Bandeally Jaffer v. Peer Mahomed* supra.

(5) *Krishna Chandra v. Jotindra Nath*, 114 I. C. 415 : A. I. R. 1929 Cal. 159.

(6) *Walaiti Ram v. Partap Singh*, 135 I. C. 194 : A. I. R. 1932 Lah. 173.

(7) *Ramalinga Ayyar v. Rayyalu Ayyar*, 122 I. C. 341 : 53 Mad. 243 : A. I. R. 1930 Mad. 356 (1).

(8) *Krishna Chandra v. Jotindra Nath*, 114 I. C. 415 : A. I. R. 1929 Cal. 159 (2).

(9) *Rali Ram v. Sant Ram-Ganpat Rai*, 142 I. C. 644 : A. I. R. 1933 Lah. 101.

S. 78

(2). (iv) The order of adjudication must have been annulled at the time the suit is brought or an application for the execution of a decree is made.

(v) The suit or application must be in respect of a debt which was proved under this Act in the insolvency proceedings.

An order of adjudication under the Act is necessary.—An order of adjudication is necessary because without an order of adjudication there is no bar for any person to prosecuting his remedy in the ordinary course of law. It is only when bankruptcy ensues that there is an end to the operation of the statute of limitation, with reference to debtor and creditor, the debtor's rights are established and the creditor's rights are established in the bankruptcy and that the statute has no application at all to such a case or the principles by which it is governed (1). Again, it is to be noted that the order of adjudication must have been passed under the Provincial Insolvency Act. Where the proceedings take place under the Presidency-towns Insolvency Act, the section has no application.

(ii) In order that the sub-section may apply, it is necessary that the order of adjudication must have prevented the person from bringing his suit, etc., in the ordinary course. The reason is that unless the order of adjudication has that effect, the very basis of the provision is gone. The section has, therefore, no application where it is the creditors or decree-holders who are adjudicated insolvent and who after the order of annulment institute a suit or file an application for execution (2). The sub-section will not also apply in respect of causes of action or debts or choses in action which are not provable in insolvency or which do not vest in the receiver on adjudication.

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(1) *Amar Singh v. Imperial Bank of India*, Jullundur, 14 Lah. 426 : 146 I. C. 696 : A. I. R. 1933 Lah. 953.

(2) *Charu Chandra v. Ramesh Chander*, A. I. R. 1937 Cal. 158.

(3) *Rama Pillai v. Kasamuthu Nadar*, 121 I. C. 485 : A. I. R. 1929 Mad. 715 ; *Machanjuri Ahmed v. Govind Prabhu*, 114 I. C. 227 : 51 Mad. 862 : A. I. R. 1928 Mad. 977 ; *Bundeally Jaffer v. Peer Mahomed*, 146 I. C. 124 : A. I. R. 1933 Rang. 75.

(4) *Machanjuri Ahmed v. Gobind Prabhu* supra ; *Bundeally Jaffer v. Peer Mahomed* supra.

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(9) *Rali Ram v. Sant Ram-Ganpat Rai*, 142 I. C. 644 : A. I. R. 1933 Lah. 101.

- S. 78. proved his debt, if he has lodged his or her proof and fulfilled all the requirements of section 49; it is not necessary that the debt must have been admitted by the receiver or satisfactorily established before him (1).

Section 78 controls section 48, C. P. C.—In sub-section (2) the words "the period of limitation prescribed for any suit or application for the execution of a decree" are general and comprehensive, and refer to the period of limitation prescribed by any law for the time being in force. They can control or modify the period of time allowed not only in the statute of limitation but also in section 48, C. P. C. (2)

Saving of limitation under section 31, proviso.—Section 31, proviso provides that no protection order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled. Though it does not refer to the question of limitation it is independent of section 78 and in order to give effect to it the period during which the protection order has been in force should be excluded for a debt included in the protection order (3).

Saving of limitation otherwise.—An application made under section 28 (2) to the insolvency court for leave to execute the decree is not an application made to the proper court within the meaning of the explanation to article 182 and does not save limitation. The insolvency court, which is entirely a creature of the Provincial Insolvency Act, is a different court from the court which is to execute the decree obtained independently of the Insolvency Act, and the mere fact that the judge is the same person will not make the two courts the same. Limitation, therefore, will not be saved under article 182 (4). But where subsequent to the adjudication of a person as insolvent certain applications made by the creditor of the insolvent were ordered to be filed, the order previous to this order made it clear that further steps were expected to be taken by the creditors and an application made by the sons of the insolvent for substitution of their names in place of the insolvent who had died during the proceedings was dismissed, it was held that the proceedings could not be said to have terminated simply because the word "filed" occurred in the order and that neither could the proceedings be said to be terminated because the application for substitution of names was rejected (5).

The judgment-debtor's entering a debt in his petition of insolvency or in the schedule attached to it and signed by him may amount to a sufficient acknowledgment of the judgment-debt or the debt within the meaning of S. 19, I. L. A. (6). Under S. 19, I. L. A., the acknowledg-

(1) *Kathara Lakshmi Bai v. Bandu Bodo Rukma Ji Rao*, A. I. R. 1934 Mad. 455; 151 I. C. 284; 57 Mad. 787.

(2) *Nak Ched Shah v. Kashmiri Bank, Ltd.*, 134 I. C. 878; A. I. R. 1932 Od. 69; 7 Luck. 397.

(3) *Sita Ram v. Kishan Lal*, A. I. R. 1930 All. 580 (2).

(4) *Chathangali Rarichan v. Purvamparambatu*, A. I. R. 1934 Mad. 392; 57 Mad. 803; 150 I. C. 113.

(5) *Rama Jodhia v. Firm Hazari Lal Mathara Prasad*, A. I. R. 1935 Pat. 480.

(6) *Rampal Singh v. Nando Lal Marwari*, 16 C. W. N. 346; A. K. R. M. M. C. T. Chhettyar Firm v. S. E. Munnee, 6 Rang. 533; 117 I. C. 570; A. I. R. 1928 Rang. 326; *Tong Hoc v. Eng. Hoseng*, A. I. R. 1928 Rang. 327; 117 I. C. 570; *Chobe Shrigopal Chiranjil Lal v. Dhana Lal Ghasiram*, 35 Bom. 393.

ment must be in writing and signed by the debtor. A deposition of the debtor which does not bear his signature, though signed by the clerk and the judge, does not save the debt from being barred (1). **S. 79.**

Section 78 (2) is not controlled by section 28 (7).—The order of adjudication in the section cannot be taken to mean the date of the presentation of the petition by applying the doctrine of relation back and the period between the date of presentation of petition and the order of adjudication cannot be deducted under the sub-section (2).

79. (1) The High Court may, with the previous sanction of the Provincial Government, make rules for carrying into effect the provisions of this Act.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide—

(a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers and the costs of such audit,

(b) for meeting of creditors,

(c) for the procedure to be followed where the debtor is a firm,

(d) for the procedure to be followed in the case of estates to be administered in a summary manner, and

(e) for any matter which is to be or may be prescribed.

(3) All rules made under this section shall be published in the local official Gazette, and shall, on such publication have effect as if enacted in this Act.

History.—The present section was amended by the Government of India (Adaptation of Indian Laws) Order, 1937. Prior to this amendment the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor-General in Council and, in the case of any other High Court, of the local Government was necessary. The publication of the rules framed by the Calcutta High Court were required to be published in the Gazette of India. The change has been made in consequence of the new Government of India Act, 1935, under which the Provincial Government have become independent of the control of the Central Government to a great extent.

The corresponding section under Act III of 1907 was section 51. Its sub-sections (1) and (3) were exactly the same as those of the present

(1) *U. Po Yin v. U. Ba Chit*, 12 Rang. 610.

(2) (*Reniguntla*) *Venkataramayya v. Thallam Subbarayudu*, A. I. R. 1936 Mad. 290.

S. 79. section before the amendment of 1937 Sub section (2) was a little different and ran as follows

2 "In particular and without prejudice to the generality of the foregoing power, such rules may provide—

(a) for the appointment and remunerations of receivers (other than Official Receivers), the audit of the accounts of all receivers and the costs of such audit,

(b) for meetings of creditors, and

(c) for the procedure to be followed in the case of estates to be administered in a summary way"

Clauses (c) and (e) of the present section are new. The object of introducing clause (c) was to provide procedure to be followed in cases where the debtor is a firm, as it is in section 112 (2) of the Presidency towns Insolvency Act, III of 1909 (1)

The section was further amended by section 6 of Act XXXI of 1926 which added clause (e) to the section and made a few grammatical changes. Section 6 was in the following terms:—

"In sub section 2 of section 79 of the said Act, the word 'and' at the end of the clause (c) shall be omitted and after clause (d), the following clause shall be added *viz.*, 'and (e), for any matter which is to be or may be prescribed'."

Analogous law—Similar rule-making power has been conferred by S. 112, P-t. I. A., on courts having jurisdiction under that Act. In England, under S 132, B. A. of 1914, the Lord Chancellor may, with the concurrence of the President of the Board of Trade, make rules for carrying into effect the objects of that Act, provided that the general rules so made shall not extend the jurisdiction of the court. It is also provided that all general rules so made shall be laid before Parliament, shall be judicially noticed and shall have effect as if enacted by the Act. Sections 103 to 136 also provide for similar matters.

It is not necessary to quote the subjects which have been particularly mentioned for the purposes of making rules under those Acts

Rules under the old Act.—Where no new rules have been framed under the P. I. A., V of 1920, rules framed under the old Act III of 1907, will hold good when they are not inconsistent with the later Act (2). Since the case cited was decided rules have been framed by the Lahore High Court under the new Act

Sub-section (2) ; clause (a).—It is to be noticed that official receivers are excluded only so far as their appointment and remuneration goes. In regard to the auditing of the accounts, they are on the same footing as other receivers.

Clause (e).—Under the Act III of 1907, it was decided by the Calcutta High Court that a firm could not be adjudged insolvent as such under that Act (3). Under the present Act rules have been framed by nearly every High Court providing for the adjudication of a firm in the

(1) Select Committee Report.

(2) S. R. Darrah v. Fazal Ahmed, 93 I. C. 903 : A. I. R. 1926 Lah. 360.

(3) Kali Charan Saha v. Hari Mohan Basak, A. I. R. 1920 Cal. 964. 52

name of the firm. Apart from the rules, the addition of clause (c) in the present section has been taken as an indication of the legislature's intention for favouring the view that a firm can be adjudicated in the name of the firm (1). S. 80

Sub-section (3); as if enacted in this Act.—The words “shall have effect as if enacted by this Act” seem to be equivalent to the words “shall be of the same effect as if they were contained in this Act.” It does not, however, mean that the rules, after such publication as is provided for, shall have the same force as the express provisions of the Act itself. If the rule is inconsistent with the provisions of the Act, it shall be *ultra vires*. This is clear from the first sub-section which confines the rule-making power of the High Courts to the carrying into effect of the provisions of the Act only.

80. (1) The High Court, with the like sanction, may from time to time direct that, in
 Delegation of powers to Official Receivers. any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely :—

- (a) to frame schedules and to admit or reject proof of creditors ;
- (b) to make interim orders in any case of urgency ; and
- (c) to hear and determine any unopposed or *ex parte* application.

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.*

History.—Under the Act III of 1907, and the Act V of 1920, before it was amended by Act XXXIX of 1926, the High Court had power to delegate the following powers, in addition to those mentioned in the section now, namely :—

- (i) to hear insolvency petitions, to examine the debtor and to make orders of adjudication ;
- (ii) to grant orders of discharge ; and
- (iii) to approve compositions or schemes of arrangement.

These powers were mentioned in clauses (a), (c) and (d) of the Act III of 1907 as well as the Act V of 1920. Clauses (a), (c) and (d) were repealed by section 7 of Act XXXIX of 1926. Section 7 of Act XXXIX of 1926 was again repealed by the schedule under section 2 of the Act XII of 1927. Again, section 3 of the Act of XVIII of 1928 repealed Act XII

(1) Muhammad Umar v. Official Receiver, Rawalpindi, 119 I. C. 735 : A. I. R. 1929 Lah. 447. See commentary under section 10, where the matter has been considered at length.

S 80. of 1927. The result of all these amendments has been that the clauses (a), (c) and (d) are left out of the section, but the paragraphs were not renumbered serially with the result that the section now appears in its present form.

Clauses (a), (c) and (d) were omitted to carry out the recommendations of the Civil Justice Committee which was in the following terms: "We feel bound to express the opinion that the person who is likely to become trustee of the debtor's estate is not a suitable person to exercise such powers as are mentioned in clauses (a), (c) or (d) of section 80. In his capacity as receiver, he has interests adverse to the debtor and should not be allowed to preside over the debtor's examination; still less does it seem proper, in a contested case, that he should decide as to acts of insolvency" (1). The anomaly pointed out by the Civil Justice Committee existed for reasons which are explained in the next paragraph. Now it has been removed.

Analogous Law.—Under the Presidency-towns Insolvency Act, the property of the insolvent on the passing of an order of adjudication vests in the official assignee. Under the English Act, it vests in the Official Receiver or the trustee in bankruptcy as soon as one is appointed by the creditors. These persons are, strictly speaking, the owners of the insolvent's property and represent his estate in all matters. Apart from these officials, there is generally another official (the Registrar), who exercises some of the powers of the court. It is provided by S. 6, P-t. I. A., that the Chief Justice or Judicial Commissioner may from time to time direct that, in any matters in respect of which jurisdiction is given to the court by that Act, an officer of the court appointed by him in this behalf shall have all or any of the powers mentioned in that section; and that any order made or act done shall be deemed as the order or act of the court. The powers which can be so delegated are the following, namely:—

(a) to hear insolvency petitions presented by debtors and to make orders of adjudication thereon, (b) to hold the public examination of insolvents, (c) to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers, (d) to hear and determine any unopposed or *ex-parte* application and (e) to examine any person summoned by the court under section 36.

S. 6, P-t. I. A., is based on S. 99, B. A., 1883, which corresponded to S. 102, B. A. of 1914. The English sections referred to also provide for the exercise of similar powers of the court by the Registrar in bankruptcy of the High Court and the Registrars of County Courts. The officers who exercise the court's powers under the English and the Presidency-towns Insolvency Act have nothing to do with the administration of the insolvent's estate in the sense in which the trustee in bankruptcy in England, the official assignee under the Presidency-towns Insolvency Act, and a receiver under the Provincial Insolvency Act, have to do. Under the Provincial Insolvency Act, 1907, the legislature appears to have combined the functions of the Registrar and the official assignee under the Presidency-towns Insolvency Act in the hands of one official, the Official Receiver. That explains the genesis of S. 52, P. I. A., 1907. The combination did not work well in practice and the Civil Justice Committee disapproved of it.

(1) Report, dated 12-4-25, page 238.

It also created difficulty in the interpretation of Ss. 22 and 46, P. I. A., 1907 (corresponding to sections 68 and 75 of the present Act (1). **Ss. 81, 82.**

81. Any Local Government may, by notification in the local official Gazette, declare that any of the provisions of this Act specified in Schedule II, shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Local Government.

Power of Local Government to bar certain provisions to certain Courts.

History.—It corresponds to section 54 of the Act III of 1907. Under section 54 the previous sanction of the Governor-General in Council was necessary for the exercise of powers by the Local Government. This is not necessary under the present Act, because of the amendment made in 1920 by schedule 1 under section 2 of the Devolution Act, No. 38 of 1920, which deleted the words "with the previous sanction of the Governor-General in Council" from the section. The provisions were also stated in the section itself, but they have now been placed in schedule 2.

Object of the section.—"It is very difficult to frame any one satisfactory law which is equally suited to different parts of the country. A law adopted for the towns is too complicated for the country districts and a law suited for the country districts is altogether insufficient for the great centres of trade. This is no new difficulty. The Select Committee has given careful consideration to this question. They feel that legal reform cannot be postponed until the requirements of the whole country become uniform and they feel that trading centres cannot be left without an adequate system of insolvency merely because other parts of the country are less developed. On the other hand, they feel that it is desirable to avoid forcing on backward districts a law which is too complicated for their requirements. In the result they suggest that a power should be inserted, corresponding to section 1 of the Transfer of Property Act, 1882, to enable Local Governments to exempt any specified districts within their territories from the operation of certain sections of the Act" (2).

Scope.—In the absence of any notification by the Local Government under the section, section 1 of the Act will have its full operation, by extending the Act to the whole of British India except the Scheduled Districts.

82. Nothing in this Act shall—

Savings.

(a) affect the Presidency-towns Insolvency Act, 1909, or

(b) apply to cases to which Chapter IV of the Dekkhan Agriculturists' Relief Act, 1879, is applicable.

(1) See in this connection *P. V. Allapichai v. Kuppai Pichai Rowther*, A. I. R. 1918 Mad. 964 and also commentary under sections 68 and 75.

(2) Proceedings of the Viceregal Council to the Act III of 1907.

S. 83. **History.**—S. 55, P. I. A., 1907, was as follows. —

“Nothing in this Act shall (a) affect the Indian Insolvency Act, 1848, or section 8 of the Lower Burma Courts Act, 1900, or (b) apply to cases to which chapter IV of the Dekkhan Agriculturists’ Relief Act, 1879, is applicable.”

By the schedule under section 3 of the Repealing and Amending Act, VIII of 1930, the words and figures “section 8 of the Lower Burma Court’s Act, 1900” which occurred in clause (a), between the figure “1909” and the word “or” have been omitted. This was found necessary on account of the repeal of the whole of the Lower Burma Courts Act, VI of 1900, by the Repealing and Amending Act, XI of 1923. The Indian Insolvency Act, was substituted by the Presidency-towns Insolvency Act, 1909, before 1920 and the necessary change was made in the section, when the Act V of 1920 was originally passed.

Clause (b).—“Under the Bill as introduced, agriculturists were put in a special position in regard to insolvency. They were allowed to institute insolvency proceedings if their debts amounted to the small sum of fifty rupees. Other debtors can only institute insolvency proceedings if their debts amount to rupees five hundred. The provision was originally taken by the Select Committee on the Code of Civil Procedure Bill from the Dekkhan Agriculturists’ Relief Act. This provision has been a good deal criticised and the Select Committee are of opinion that there is no sufficient reason for giving special treatment to agriculturists. If special treatment is to be given to them as a part of the general treatment of agricultural indebtedness, it should be struck out of the Bill, but in lieu of it, provisions have been inserted to preserve any special enactments in regard to agriculturists which are now in force, and in particular, to expressly preserve the operation of the insolvency sections of the Dekkhan Agriculturists’ Relief Act (XVII of 1879) (1).”

83. (2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

History.—Sub-section (1) of section 83 of the Act V of 1920 ran as follows :—

“1. The enactments mentioned in Schedule III are hereby repealed to the extent specified in the fourth column thereof.”

This sub-section was repealed by the schedule under section 2 of the Repealing Act, XII of 1927. Again, by the Schedule II under section 3 of Act XVIII of 1928 the said Act XII of 1927 was repealed. The result is that sub-section (1) was not revived and sub section (2) was not renumbered.

(1) Proceedings of the Viceregal Council, dated 15th March, 1907.

Agra Tenancy Act unaffected by the Act.—By section 193 of the Agra Tenancy Act, Chapter 20 of C. P. C. of 1882, is made in applicable to proceedings under the Tenancy Act. By section 56 of the Provincial Insolvency Act of 1907, Chapter XX of C. P. C. 1882, was repealed and it was enacted that references to Chapter XX should be construed as applying to the Provincial Insolvency Act of 1907. Hence Provincial Insolvency Act of 1907, does not apply to proceedings under Agra Tenancy Act of 1901 and therefore S. 16 (2), P. I. A., 1907, does not bar a suit for arrears of rent against a tenant of occupancy holding although the tenant is an undischarged bankrupt (1). Section 56, sub-section (2) P. I. A., 1907 was, in exactly the same terms as the present sub-section (2). S 83.

Schedules I, II and III are to be taken from the bare Act or any text book.

(1) *Karka Das v. Gujju Singh*, 62 I. C. 597 : 43 All. 510 : A. I. R. 1921 All 13, Full Bench, overruling 84 All. 121.

SCHEDULE I

[See section 75 (2)]

Decisions and Orders from which an appeal lies to the High Court under section 75 (2)

Section.	Nature of decision or order
4	Decision of questions of title, priority, etc., arising in insolvency.
25.	Order dismissing a petition.
26.	Order awarding compensation.
27.	Order of adjudication.
33	Orders regarding entries in the schedule.
35.	Order annulling adjudication.
37.	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication
41.	Order on application for discharge.
50.	Order disallowing or reducing entries in the schedule
53.	Order annulling a voluntary transfer.
54	Decision that a transfer of property is a preference in favour of a creditor.

SCHEDULE II.

(See section 81.)

Provisions of the Act application of which may be barred by Local Governments.

Provisions of the Act.	Subject.
Section.	
26.	Award of compensation.
28, sub-section (3)	Reputed property of an insolvent.
34.	Debts provable under the Act.
38.	} Compositions and schemes of arrangement.
39.	
40.	
42, sub-sections (1) and (2)	Obligation to refuse absolute discharge.

45. }
 46. }
 47. } Method of proof of debts
 48. }
 49. }
 50. }

51. }
 52. }
 53. } Effect of insolvency on antecedent transactions
 54. }
 55. }

51* [except Priority of debts
 clause (a)
 of sub-
 section
 (1) and
 sub-sec-
 tion (4)].

62. }
 63. } Dividends
 64. }
 65. }

66. Management by and allowance to insolvent.
 72. Penalty for obtaining of credit by undischarged
 insolvent.

[SCHEDULE III.] [Enactments repealed] Repealed by the
 Repealing Act, 1927 (12 of 1927).

THE PROVINCIAL INSOLVENCY RULES

ALLAHABAD HIGH COURT.

Rules framed under section 79 of the Provincial Insolvency Act,
V of 1920

Published in the Allahabad Gazette, dated the 22nd April 1922.

The following amendments are made in the General Rules (Civil) of 1911, with the previous approval of Government as required by section 79 of the Provincial Insolvency Act, V of 1920 —

For the rules in Chapter XIX substitute the following rules :—

1. These rules may be cited as "The Agra Provincial Insolvency Rules." The forms Nos. 138 to 152 (shown in Volume II, Appendices) with such variations as circumstances may require shall be used for the matters to which they severally relate.
2. Every insolvency petition shall be entered in the Register of Insolvency Petitions (Form No. 80) to be maintained in all Courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.
3. All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has tendered proof of his debts, or any legal representative on their behalf at such times and subject to the same rules as other Court records.

Notices.

4. Whenever publication of any notice or other matter is required by the Act to be made in an official Gazette, or is required by the rules framed under the Act to be made in a local newspaper, a memorandum referring to and giving the date of such advertisement shall be filed with the record and noted in the order sheet.

5. Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall, in addition to the publication thereof in the local Official Gazette as required by the Act, be also advertised in such newspaper or newspapers as the Court may direct.

A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect to notices of the date for consideration of a proposal for composition or schemes of arrangement under section 38 (1).

6. Notice of an order of adjudication under section 30 which is required by the Act to be published in the local Official Gazette shall also be published in such local newspaper or newspapers as the Court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the Head of the Office in which he is employed.

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2).

7. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local Official Gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not.

10. A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11. In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance by affixing copies in the court-house or by beat of drum in the village in which the insolvent resides.

Receivers.

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor, and forwarded to the person appointed.

13. (a) A Court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(b) When a Receiver realizes the security of a secured creditor the Court may direct additional remuneration to be paid to him with reference to the amount of work done by him and the benefit resulting therefrom to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

15. The Receiver shall ordinarily deposit the money realized by him in the Government Treasury or whenever for any particular reason any money in any case is placed in a bank approved by the Court in fixed deposit bearing interest, the amount of interest shall be credited to the estate.

16. The Receiver shall *submit* to the Court each quarter not later than the 10th day of the month next succeeding the quarter to which it relates, an account showing all the receipts and disbursements in the case or cases in which he is Receiver.

17. Whenever there are no funds in the estate and the Receiver receives financial help from any creditor he should show in the accounts of the estate the amount so received.

18. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's accounts (or any part thereof) relating to

THE PROVINCIAL INSOLVENCY RULES

the estate, as shown by the cash book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies. No court-fee will be required for such copies.

19. In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give at least 14 days' notice to the debtor and to every creditor of the time and place appointed for each meeting. Such notices shall be served by registered post.

Proof of debts.

20. A creditors' proof may be in form No. 143 in the Appendix with such variation as circumstances may require.

21. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No. 144 in the Appendix

Procedure where the debtor is a firm.

22. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature, *e.g.*, "Brown & Co., by James Green, a partner in the said firm."

23. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court upon partners, or upon any person having at the time of service the control or management of the partnership business there.

24. The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

25. Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who sign the petition showing that all the partners concur in the filing of the same.

26. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

27. In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

28. The joint creditors, and each set of separate creditors may severally accept compositions or schemes of arrangements. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

29. Where proposal for compositions or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

30. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. Any when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Applications and notices.

31. (a) Every application to the Court either by the Receiver or by any creditor, or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular, and without prejudice to the generality of this rule, for an order deciding any questions under sections 4, 51, 52, 53, 54 and 55 or any one of them, shall (unless otherwise provided by these rules, or unless the Court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant.

(b) Every such application shall state in substance the nature of the order or relief, applied for, the section of the Act under which such application is made, the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon.

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing; in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely.

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely as mentioned in sub-section (c) hereof, unless the number or volume of such document is exceptionally great in which case notice of the fact shall be given to the Receiver, and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing.

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely.

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit.

(g) A copy of every application mentioned in sub-section (a) hereof, and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him.

Sale of immovable property of insolvent.

32. If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the Court. The cost of registration [if any] will also be borne by the purchaser.

Dividends.

33. The amount of the dividend may at the request and risk of the creditor be transmitted to him by post.

Summary Administration.

34. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely :—

(i) There shall be no advertisement of any proceeding in the Official Gazette or a local paper.

(ii) The petition and all subsequent proceedings shall be endorsed "summary case."

(iii) The notice of the hearing of the petition to the creditors shall be in Form No. 151 in the Appendix.

(iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.

(v) The appointment of a Receiver will often not be necessary and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

35. All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate.

36. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refused to approve the composition or scheme.

37. Where an order of adjudication is made on a debtor's petition, and the Court is satisfied that the debtor is unable to pay the cost of publication in the local Official Gazette, of the notice required by section 30 of the Act, the Court shall direct that such cost be met from the sale proceeds of the property of the insolvent. If the insolvent has no property, or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof shall be remitted.

BOMBAY HIGH COURT.

No. 5730.—By virtue of the provisions of section 79 of the Provincial Insolvency Act (V of 1920), and of all other powers thereunto enabling, the High Court of Judicature at Bombay, has, with the previous sanction of His Excellency the Governor in Council, and in supersession of the Bombay Provincial Insolvency Rules, 1909, made the following rules for carrying into effect the provisions of the said Act :—

I.—The rules may be called “The Bombay Provincial Insolvency Rules, 1924”, and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Bombay. They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II.—The forms mentioned in these rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III.—(1) In these rules unless there is anything repugnant in the subject or context—

“the Act” means the Provincial Insolvency Act, V of 1920 ;

“the Court” includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act ;

“receiver” means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver ;

“*interim* receiver” means receiver appointed by the Court under section 20 of the Act ;

“proved debt” means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided, all words and expressions used in these rules shall have the same meaning as those assigned to them in the Act.

Petitions.

IV.—(1) Every insolvency petition shall be entered in the Register of Insolvency petitions to be maintained in Form No. 7 in all Courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

(2) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

V.—(1) When an Insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors, and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine.

VI.—A debtor's petition shall be in Form No. 2 and a creditor's petition shall be in Form No. 3.

VII.—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that the notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons.

Proof of Debts.

VIII.—(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 7 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered the Court shall, by order in writing, admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX.—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other person on behalf of all such creditors. Such proof should be in Form No. 8.

Schedule of Creditors.

X.—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80.

Scheme.

XI.—(1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal, and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

Receivers.

XII.—(1) Every receiver or *interim* receiver other than the Official Receiver shall be required to give such security as the Court thinks fit; provided that a Nazir, or Deputy Nazir, or other Government Officer who is appointed a receiver or *interim* receiver *ex-officio*, and who has already under the Public Accountant's Default Act, XII of 1850, or otherwise, given security, that is still valid, for the due account of all moneys which shall come into his possession or control by reason of his office shall not be required to give such security unless, owing to the extent of the assets likely to be realised, or for other special reasons, the Court thinks it desirable to do so.

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2); but he shall, previous to his admission, or within such further time as the Court may allow, give general security by entering into a recognizance with one or more sufficient sureties in Form No. 16 or by depositing Government Securities, in such time as the High Court may fix in this behalf.

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall, when the debtor is the petitioner, and may, when a creditor is the petitioner, at the same time appoint him an *interim* receiver under section 20, and confer on him all the powers conferable on a receiver under Order XL, rule (1) (a) of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing him Receiver for the property of the insolvent under sections 56 and 57. The Official Receiver should at the same time submit a draft order in Form No. 6, with the necessary modifications, for signature and sealing.

XIII.—(1) The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or *interim* receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIV.—Every receiver or *interim* receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XV.—(1) Every application to the Court made by a receiver or an *interim* receiver shall be in writing.

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XVI.—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of the dividends.

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

(3) If a receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVII.—The Receiver in making his report shall state whether in his opinion any of the facts mentioned in section 43, sub-clause (1), of the Act exists, and if the debtor makes a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of creditors and shall state the reasons for his opinion.

XVIII.—If the Court directs, the debtor shall furnish the Receiver or, if a Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or, if a Receiver has not been appointed, the Court may direct; provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XIX.—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) Any creditor who has proved his debt, or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor.

XX.—The Receiver shall deposit all valuable securities for safe custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India, and whenever a sum exceeding Rs. 500 shall stand to the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates.

Dividends.

XXI.—No dividend shall be distributed by a Receiver without the previous sanction of the Court.

XXII.—The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post.

Discharge.

XXIII.—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the

Receiver has submitted his report. The Receiver, if he is in a position to make it and has already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge : provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the hearing, a notice stating the ground of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor : and a creditor who has served the prescribed notices, shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or, by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by Pleader, and any creditor, in person or by Pleader, who has served the prescribed notice.

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for order under section 43. If the Court has omitted to specify a period under section 27 (1) and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge, Notice of such period shall be given to the Receiver and the debtor, and if on its expiry, the debtor has not applied accordingly, the case shall be brought up for orders under section 43.

Notices.

XXIV.—(1) The notices to be given under sections 30 and 37 (2) of the Act shall be published in the Bombay Government Gazette, in English, and, if the Court so directs, in any suitable English or Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notice to be given under sections 19 (2), 38 (1) and 41 (1) of the Act shall be published in any suitable English or Vernacular newspaper, and if the Court so directs, in the Bombay Government Gazette, and copies of the notices in English and in the language of the Court shall be fixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all the creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than 14 days before the said date.

(4) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered post, to all creditors who have tendered proof of their debts not less than 14 days before the said date.

(5) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the Schedule of creditors not less than 14 days before the said date.

(6) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(7) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may, if the Court so directs, be served on any or all such creditors by registered post.

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons.

(9) In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the debtor resides.

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

Summary Administration

XXV.—When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and rules shall, subject to any special direction of the Court and in addition to the modifications contained in section 74, be modified as follows, namely :

(i) There shall be no advertisement of any proceedings in a local paper.

(ii) The petition^{*} and all subsequent proceedings shall be endorsed "Summary Case."

(iii) The notice of the hearing of the petition to the creditors shall be in Form No 15.

(iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.

(v) The appointment of a Receiver will generally not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Sale of immovable property of debtor.

XXVI.—If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the debtor, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court.

Costs.

XXVII.--(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them ; but when an order of adjudication has been made, the costs of the petitioning creditors shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition.

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs. 150 to cover expenses. Such deposits shall be paid out of the first available assets realised.

Procedure where the Debtor is a Firm.

XXVIII.—(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co., by James Green, a partner in the said firm."

(2) Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

(3) The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

(4) Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

(5) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

(6) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

(7) The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

(8) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the

joint creditors shall be considered and voted upon by them apart from every set of separate creditors ; and the proposal made to each set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

(9) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Inspection of Proceedings

XXIX.—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe, by the Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

Pleaders' Fees.

XXX.—The fees allowed to Pleaders as costs in any proceedings under the Act shall be such as are allowed under the rules of the Court for a miscellaneous proceeding.

CALCUTTA HIGH COURT.

Published in the Calcutta Gazette, dated 8th June 1921.

Framed under Section 79, Act V of 1920—1 The following rules may be cited as "The Provincial Insolvency Rules." The forms prescribed by these rules, with such variations as circumstances may require, shall be used for the matters to which they severally relate.

2. Every insolvency petition shall be entered in the Register of Insolvency Jurisdiction, and shall be given a serial number in that Register, and all subsequent proceedings in the same matter shall bear the same number.

3. All insolvency proceedings may be inspected at such times, and subject to such restrictions as the District Judge may prescribe, by the Receiver, the debtor, and any creditor who proved, or any legal representative on their behalf.

Notices.

4. Whenever publication of any notice or other matter is required by the Act or these Rules to be made in an official Gazette, a memorandum referring to and giving the date on which such advertisement appeared shall be filed with the record and noted in the order-sheet.

5. Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under section 38 (1).

6. Notice of an order of adjudication under section 30 may, in addition to the publication in the local official Gazette required by the Act, be published in such newspapers as the Court may direct. When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under section 37 (2).

7. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official Gazette and in such

newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not.

10. A certificate of an officer of the Court or of the Official Receiver, or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11. In addition to the prescribed methods of publication, any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the insolvent resides.

Receivers

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor, and forwarded to the person appointed.

13. (1) A Court when fixing the remuneration of a Receiver should, as a rule, direct it to be in the nature of a commission or percentage of which one part should be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(2) When a Receiver realises the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

15. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's Accounts for any part thereof relating to the estate, as shown by the cash-book up to date, and shall be entitled to such copy of payment of the charges laid down in the rules of this Court regarding the grant of copies.

16. In any case in which a meeting of creditors is necessary and in any case the debtor proposes a composition or scheme under section 38, the Receiver shall give seven days' notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post.

Proof of Debts.

17. A creditor's proofs should be in Civil Process Form No. 146, in Volume II, with such variations, as circumstances may require.

18. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other persons on behalf

of all such creditors. Such proof shall be in Civil Process Form No. 147 in Volume II.

Procedure where the Debtor is a Firm.

19. Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co by James Green, a partner in the said firm."

20. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

21. The provision of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

22. Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

23. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

24. In cases of partnership the debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs.

25. The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

26. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

27. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Sale of Immovable Property of Insolvent.

28. If no Receiver is appointed and the Court, in exercise of its powers under section 53 of the Act, sells any immovable property of the insolvent, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser.

Dividends.

29. The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post.

Summary Administration.

30. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows namely :—

(i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper.

(ii) The petition and all subsequent proceedings shall be endorsed "Summary Case."

(iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No. 150 in Volume II.

(iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.

(v) The appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

31. All proceedings under this Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the reasonable costs of the petitioning creditor shall be payable out of the estate.

32. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

LAHORE HIGH COURT

Rules made by the High Court with the sanction of the Local Government under the powers conferred by section 79 of the Provincial Insolvency Act, 1920, for carrying into effect the provisions of the Act.

1. These rules may be cited as "The Punjab Provincial Insolvency Rules" and shall apply to all proceedings under the Provincial Insolvency Act, 1920.

2. The forms annexed to these rules (printed at the end) with such variations as circumstances may require, shall be used for the matters to which they severally relate.

3. (i) In these rules, unless there is anything repugnant in the subject or context—

"The Act" means the Provincial Insolvency Act, 1920.

"Receiver" means a Receiver appointed by the Court under Section 56 (1) of the Act.

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act.

"Proved debt" means the claim of a creditor so far as it has been admitted by the court, or by the Official Receiver empowered under Section 80 (1) (b) of the Act.

(ii) Unless there is anything repugnant in the context, words and expressions used in these rules shall have the same meanings as those assigned to them in the Act, and references to sections shall be taken to be references to sections of the Act.

4. (a) Every insolvency petition shall on institution be entered in Civil Register of Miscellaneous Cases (Register No. II) in all courts exercising insolvency jurisdiction and shall be given a serial number in that register. If the petition results in adjudication, the case should be entered in the Register of persons adjudicated insolvents to be maintained in Form No. 15 attached to these rules and all entries relating to proceedings subsequent to adjudication should be made in this Register.

(b) Miscellaneous applications under sections 4, 53, 54 and 69 of the Provincial Insolvency Act should be entered in Civil Register No. VI (Register of Miscellaneous Petitions) which is the proper register for entering such applications. A separate register should be maintained in this form for insolvency cases.

5. All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has proved, or any legal representative on their behalf at such times and subject to the same rules as other court records (*vide* Volume IV, Chapter 16 — Records) provided that no fee shall be charged for inspection made by the Receiver.

Notices.

6. Whenever publication of any notice or other matter is required by the Act to be made in an official gazette, a memorandum referring to, and giving the date of, such advertisement shall be filed with the record and noted in the order sheet.

7. (i) Notice of order fixing the date of the hearing of petition under section 19 (2) may, in addition to the publication thereof in the local official gazette, be also advertised in such newspaper or newspapers as the court may direct. A copy of the notice shall also be forwarded by registered post to each creditor, to the address given in the petition, or served on the creditor in the manner prescribed for the service of summonses, as the court thinks fit. The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under section 38 (1).

(ii) Where the petition is by a creditor, a notice shall be served on the debtor in the manner prescribed for the service of summonses.

8. Notices of order of adjudication under section 30 shall be published in the local official gazette and may also be published in such newspaper or newspapers as the Court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed.

The same procedure shall be followed in regard to notice of orders annulling adjudication under section 37 (ii).

9. The notices to be given under section 33 (3) of the Act shall be served only on the Receiver and on the creditors who have proved their debts and may, if the Court so direct, be served on any or all such creditors by registered post.

10. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter.

11. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

12. (i) When the creditors appear in Court in answer to the notices issued under section 19 (2) of the Act or appear to prove their debts, they shall be required to give their addresses for service by post.

(ii) Whenever an order of adjudication is made, the Court should at the same time, fix a date on or before which the insolvent should apply for discharge.

(iii) When an application for discharge is made, the Court should fix a date for hearing it and issue notices (ordinarily by registered post) to the creditors at the addresses furnished by them.

13. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and may also be published in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors, whether they have proved or not, or served on them in the manner prescribed for service of summons, as the Court thinks fit.

14. A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rule has been duly posted, accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

15. In addition to the methods of publication prescribed in these rules, the notice issued thereunder may be served in the discretion of the Court in such other manner as the Court may direct, for instance, by affixing copies on the Court house or by beat of drum in the village where the insolvent resides

16. Every notice issued under rules 7, 8, 11 and 12 shall be published or issued at least 14 days before the doing of the act of which warning is given in such notice.

NOTE.—Whenever notice is permitted by these rules to be sent by registered post, it should be with acknowledgment due.

Receivers and Interim Receivers.

17. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order, sealed with the seal of the Court, shall be served on the debtor, and forwarded to the person appointed.

18. Every Receiver or Interim Receiver, other than an Official Receiver, shall be required to give such security as the Court thinks fit. (As regards security to be taken from Official Receivers, see Chapter 5 of this Volume.)

19. As soon as the schedule of creditors has been framed, a copy thereof shall be supplied to the Receiver or Interim Receiver, as the case may be, and all subsequent entries and alterations made therein, shall be communicated to the Receiver or the Interim Receiver.

20 (i) A Court when fixing the remuneration of Receiver should, as a rule, direct it to be in the nature of a commission of percentage not exceeding $7\frac{1}{2}$ per cent of the amount of the dividends, of which one part should be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividends.

This commission is intended to cover all office expenditure, including cost of establishment, if any, to be maintained by the Receiver for the discharge of his duties, and contingencies such as purchase of account books and forms and issue of notices, etc., incurred by the Receiver in connection with the administration of the Insolvents' Estates.

(ii) Where a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of the work which he has done and the benefit resulting to the creditors.

(iii) If a Receiver has been appointed in an insolvency proceeding in which the Court makes an order approving a proposal under section 39, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for payment of the remuneration and shall be subject to the payment thereof.

21. If a person is specially appointed an Interim Receiver and is afterwards appointed Receiver in the case, his realizations in both the capacities can be treated alike and the ordinary commission charged. Other cases, in which an Interim Receiver does work, but there is no adjudication or substantive receivership, are few, but in them if any real work is done beyond the taking charge of such insignificant movables as the debtor produces voluntarily, it will probably have to be done quickly

and be of a definite character and if any remuneration has to be fixed separately in those cases, it should be such sum as the Insolvency Judge may decide on the Receiver's appointment, subject to a maximum of one per cent. on the estimated value of the property.

22. The Receiver shall keep a Cash Book, a Dividend Register and such other books as may be required to give a correct view of his administration of the Estate, and shall submit his accounts at such times and in such form as the Court may direct. In the absence of any such directions, the Receiver shall submit to the Court for each quarter, not later than the 10th day of the month next following, an account, showing all the receipts and disbursements in cases in which he is a Receiver. The Receiver's accounts shall be audited by the Local Audit Department of the Accountant General, Punjab. The cost of the audit shall be paid out of the estate at the rate of $1\frac{1}{2}$ per cent. of the total realizations.

23. Receivers should not amalgamate their transactions relating to interim proceedings with those of Insolvent Estates.

24. The cash which is realized or collected by an Interim Receiver should be deposited in the Imperial Bank or some other approved Bank, and not mixed up with the Insolvent Estates Fund of which an account is kept in the treasury.

25. An Interim Receiver shall be required to maintain only the following books and forms :—

- (i) A Cash Book in Form No. 15 of Official Receivers.
- (ii) A Receipt Book in Form No. 9 of Official Receivers.
- (iii) A Property Register in Form No. 16 given at the end of these rules.

26. A separate audit of interim accounts is unnecessary because if the interim appointment leads to full receivership after adjudication the Interim Accounts will be incorporated in the receiver's accounts which will then be audited as such in the usual way. If however, the petition for insolvency is dismissed, no audit is required because the debtor would, under the circumstances, himself take back the estate from the Interim Receiver.

27. Any creditor who has proved his debt may apply to the Court for a copy of the receiver's accounts, or any part thereof, relating to the Estate, as shown by the Cash Book up to date and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies.

28. The Receiver shall deposit all valuable securities and cash for safe custody with the Nazir (who shall enter the same in the Malkhana Register to be maintained in form 23 and paste a label thereon in form 24 as prescribed for Official Receivers in Chapter 5-B, Rules and Orders, Vol II) or in the Imperial Bank of India, or any other approved Bank, as the Court may direct, and whenever a sum exceeding Rs. 500 shall stand to the credit of any one Estate, the Receiver shall give notice thereof to the Court; and, unless it shall appear that a dividend is about to be shortly declared, he shall obtain the Court's orders as to investment of the same in a suitable manner, e.g. in securities or as a fixed deposit with a Bank, etc.

29. (i) The Court may remove or discharge any Receiver or Interim Receiver, and any Receiver or Interim Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents, relating to the debtor's property which are in his possession or under his control, to such person as the Court may direct.

(ii) If an order of adjudication is annulled, the Receiver, if any, shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents, relating to the debtor's property, which are in his possession or under his control, to the debtor or to such other person as the Court may direct.

30. (i) Unless the Court otherwise directs, the Receiver or Interim Receiver shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge, draw up a report upon the cause of the debtor's insolvency, the conduct of debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings, and in particular such report shall state specifically whether any of the facts mentioned in each of the clauses of or sub-section (1) of section 42 exist or do not exist.

(ii) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

31. Every Receiver or Interim Receiver shall be deemed for the purposes of the Act and of these Rules to be an officer of the Court.

Proof of debts.

32. (i) A creditor's proof may be by an affidavit in Form No. 6 with such variations as circumstances may require.

33. In any case in which it appears from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No. 7.

Dividends.

34. (i) A dividend should be declared in each estate ordinarily every six months, *i.e.*, on the 1st July and the 1st January each year.

(ii) If sufficient funds are not available for a particular dividend in any particular estate a report to this effect should be made to the Court for orders on these dates.

(iii) No dividends shall be distributed by a Receiver without the previous sanction of the Court.

(iv) Notice that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(v) An order shall not be made under section 65 of the Act without giving the Receiver an opportunity to show cause why the order should not be made.

(vi) The amount of the dividend may, at the request, expense and risk of the creditor, be transmitted to him by post

But if the amount is under Rupees twenty, the Official Receiver may, after due notice, remit the sum by post to the creditors concerned at their expense and risk even when no formal request has been made by them.

(vi.) Where the assets in the hands of the Official Receiver are too small for distribution as dividend, *e.g.*, a rupee or so these sums may be treated with the permission of the Court in each case, as "unclaimed" by creditors and eventually lapsed to Government

Procedure where the debtor is a firm.

35. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature, *e.g.*, "Brown & Co by James Green, a partner in the said firm."

36. Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

37. The provision of the last preceding rule shall, so far as the nature of the case will admit apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own

38. Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

39. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order are partners in that firm.

40. In cases of partnership, the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

41. The joint-creditors and each set of separate creditors, may severally accept composition or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

42. Where proposals for composition or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint-creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

43. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of each last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Summary Administrations.

44. When an estate is ordered to be administered in a summary manner under section 74 of the Act the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely :—

(i) there shall be no advertisement of any proceedings in the local official gazette or any newspaper ;

(ii) the petition and all subsequent proceedings shall be endorsed “Summary Case” ;

(iii) the notice of the hearing of the petition to the creditors shall be in Form No. 14 ;

(iv) the Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor ;

(v) the appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings. The administration charges, however, shall be levied at the same rates as in ordinary cases. These charges should be credited into the treasury under Head XXI—Administration of Justice—Misc. Fees and Fines—Insolvency Court Receipts ;

(vi) the ordinary Nazarat staff should be employed for conducting sales ;

(vii) the only registers which need be kept are the Cash Book, the Dividend Register, the Register of Property and such other Registers as may be required to give a correct view of the administration of the estate.

Prosecutions.

45. Before passing an order for making a complaint of any offence referred to in section 69, the Court shall issue a notice to the debtor calling upon him to show cause why such an order should not be passed against him.

Discharge.

46. An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report, (*vide* Rule 30). The Receiver, if he is in a position to make it and has not already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application.

47. Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge.

48. At the hearing of the application the Court may hear any evidence which may be tendered by a creditor and also any evidence which may be entered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor in person or by pleader.

49. Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for orders under section 43. If the Court has omitted to specify a period under section 27 (1), and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry the debtor has not applied accordingly, the case shall be brought up for orders under section 43.

Sale of immovable property.

50. If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sell any immovable property of the insolvent, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser.

51. As a rule property should be sold by public auction, sales in any other manner should only be made with the sanction of the Court.

Costs.

52. All proceedings under the Act, down to and including the making of an order of adjudication, shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made on the petition of a creditor the cost of the petitioning creditor including the costs of the publication of all notices required by the Act or Rules shall be taxed and be payable out of the Estate.

NOTE.—All expenses including the expenses of any travelling done by an Interim Receiver with the permission of the Court granted after hearing the applicant have to be met by the party prosecuting the application according to this rule, and if these expenses are not furnished the application for insolvency should be filed.

53. A person applying to be adjudicated an insolvent shall deposit a fee of at least Rs 20 or such further sums, if any, as the Court may, from time to time, direct to cover the cost of the issue of the prescribed notices, of their publication in the *Government Gazette* and of all other proceedings under the Act, down to and including the making of an order of adjudication. Each such deposit shall be treated in Chapter 10 of this volume.

NOTE No. 1.—This deposit does not cover process-fees, which shall be realized, as usual, in Court fee stamps according to the rules.

NOTE No. 2.—This deposit is meant not only for paying the expenses of publication of certain notices in *Government Gazette*, but also to cover the cost of issue of the prescribed notices and all other proceedings under the Act down to a certain stage. The postage for notices should not,

therefore, be recovered from the parties concerned until the deposit made under this rule has been exhausted and there is an express order of the Court for the purpose.

NOTE No 3.—The amounts of undisbursed balance of the deposits should be transferred to the insolvent's assets after adjudication. All expenses incurred after the order of adjudication can be met out of these assets.

54. No cost incurred by a debtor in connection with an application to approve of a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme.

55. If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or Interim Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied, in the first place, towards the payment of such advances with interest thereon at 6 per cent. per annum.

Forms in Insolvency Proceedings.

FORM No. 1.

GENERAL TITLE.

In the Court of

Insolvency Petition No. of 19 .

In the matter of

Ex-parte (here insert "the Debtor" or "A.B. or creditor" or "the Official Receiver" or "the Receiver").

FORM No. 2.

DEBTOR'S PETITION. (SECTION 13)

IN THE COURT OF

Insolvency Petition No. of 19 .

I. (a)

ordinarily residing at (or "carrying on business

(a) Insert name and address and description of debtor.

at" or "personally working for gain at," or "in custody at

(b) State name of Court and particulars of decree, in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property.

") in consequence of the order of (b) being unable

to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is

(c) State whether and how many of the debts are secured.

Rs. (c) as set

out in detail in Schedule A annexed hereunto, which con-

tains the names and residences of all my creditors so far as they are known to, or can be ascertained by me. The amount and particulars of all my property are set out in Schedule B annexed hereunto together with a specification of all my property not consisting of money and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

I have not on any previous occasion filed a petition to be adjudged an insolvent or, I set out in Schedule C particulars relating to my

previous petition to be adjudged an insolvent.
petitions

Signature.

(Verification clause as in plaints).

SCHEDULE A (DEBTS).

Name of creditor.	Residence of creditor.	Amount of debt.	Nature of debt.	SECURITY.		REMARKS.
				Nature.	Amount.	
1	2	3	4	5	6	7
					Rs. A. P.	

Column 4—In this column enter whether the debt is a judgment-debt, amount due on promissory note, mortgage debt, verbal loan, balance for goods, security for another, etc. In the case of judgment-debt state the name of the Court and the number of the case.

Column 5—In this column state the nature of property whether land, house, gold, etc., and the nature of the security, whether deposit, pledge without possession, pledge with possession, mortgage deposit of title deeds, etc.

SCHEDULE B (ASSETS).

(1)—*Movable and immovable property.*

Description of property.	Place where situated.	In whose possession.	IN THE CASE OF LAND.		Value of property.	IF MORTGAGED, STATE.		REMARKS.
			Name of estate and holding No.	Area.		Name and residence of mortgagee.	Amount of mortgage.	
1	2	3	4	5	6	7	8	9
					Rs. A. P.		Rs. A. P.	

Column 9.—In the remarks column state if petitioner is only part owner of the property, and, if so, who the other owners are, and what his share in the property is.

(2)—*Debts owing to petitioner.*

Name of debtor.	Residence of debtor.	Nature of debt.	Amount of debt.	When contracted.	Good, bad or doubtful.	SECURITY.		REMARKS.
						Nature.	Amount.	
1	2	3	4	5	6	7	8	9
			Rs. A. P.				Rs. A. P.	

Column 3 —In this column enter particulars as in column 4 of Schedule A.

SCHEDULE C.

Former petitions for insolvency by the petitioner.

Serial No.	Date of petition.	Date of adjudication, if any.	Date and description of final order on the former petition.	(a) REMARKS.

(a) If the petition was dismissed, state the reasons for dismissed. If the debtor has previously been adjudged an insolvent, give concise particulars of his insolvency, including a statement, whether any previous adjudication has been annulled, and if so, the grounds therefor.

THE PROVINCIAL INSOLVENCY RULES

FORM No. 3.

NOTICE TO CREDITORS OF THE DATE OF HEARING OF
AN INSOLVENCY PETITION.

Section 19.

Insolvency Petition No. _____ of 19 ____ .

IN THE COURT OF _____

Whereas A. B. _____ has applied to this Court by a petition, dated _____ of 19 _____, to be declared an insolvent under the Provincial Insolvency Act, 1920, and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the _____ day of _____ 19 _____, for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter, you should attend in person or by duly instructed pleader. The particulars of the debt alleged in the petition to be due to you are as follows :—

Judge.

FORM No. 4.

ORDER OF ADJUDICATION, SECTION 27.

IN THE COURT OF _____

Insolvency Petition No. _____ of 19 ____ .

Pursuant to a petition, dated _____, against (here insert name, description and address of debtor) and on the application of (here insert "the Official Receiver" or "the debtor himself" or "A. B. of _____ a creditor") and on reading _____ and hearing _____ it is ordered that the debtor be, and the said debtor is hereby, adjudged insolvent.

It is further ordered that the debtor do apply for his discharge within (a) _____
on or before _____
Dated this _____ day of _____ 19 ____ .

Judge.

(a) Here state the period or the date on or before which the insolvent must apply for his discharge.

FORM No. 5.

ORDER APPOINTING RECEIVER.

Section 56.

IN THE COURT OF—

Insolvency Petition No. _____ of 19 ____ .

Whereas A. B. _____ was adjudicated an insolvent by order of the Court, dated _____, and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary.

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and A. B. _____ (or the Official Receiver) is hereby constituted Receiver of the property of the said insolvent. And it is further ordered that the

said Receiver (not being the Official Receiver) do give security to the extent of _____ and that his remuneration be fixed at _____

Dated

Judge.

FORM No. 6.

PROOF OF DEBTS.

General Form, section 49.

(Title.)

(a) Here insert number given in the notice. In the matter of _____ No. (a) of 19 ____.

(b) Address in full. I, _____ of (b) _____ make oath and say (or solemnly and sincerely affirm and declare).

1. That the said _____ ^{was}/_{were} at the date of the petition, viz., the day of _____

19 ____ and still ^{is}/_{are} justly and truly indebted to me in the sum of Rs. _____ as. p. _____ for (c) _____ as shown

(c) State consideration by the account endorsed hereon (or *the following account*), viz., for which sum or any and specify the vouchers (if any) in support of the part thereof I say that I have not, nor hath claim. _____ or any person by _____ order to

my knowledge or belief for _____ use had or received any manner of satisfaction or security whatsoever save and except the

(d) Here enter details of following (d) securities, bills or the like.

Admitted to vote for Rs. _____ } Sworn at _____ this _____ day of _____ before me _____
Judge or Official Receiver. } *Deponent's signature.*

Commissioner.

FORM NO. 7.

PROOF OF DEBT OF WORKMEN.

(Title)

I (a) of (b) make oath and say (or solemnly and sincerely affirm and declare) —

(c) That (c) $\frac{\text{was}}{\text{were}}$ at the date of the adjudication, viz, the day of

19 , and still $\frac{\text{is}}{\text{are}}$ justly and truly indebted

(a) Fill in full name, address and occupation of deponent

(b) The above-named debtor or the foreman of the above-named debtor or on behalf of the workmen and others employed by the above-named debtor.

(c) "I" or "he said"

(d) "My employ" or "the employ of the above-named debtor."

(e) "Me" or "the above-named debtor,"

of them, had or received any manner of satisfaction or security whatsoever.

Admitted to vote for Rs.

Judge or Official Receiver.

} Sworn at

this day of
before me

Deponent's signature.

Commissioner.

FORM NO. 8.

NOTICE TO CREDITORS OF THE DATE OF CONSIDERATION OF A
COMPOSITION OR SCHEME OF ARRANGEMENT.

Section 38.

(Title)

Take notice that the Court has fixed the

day of 19 for the consideration of a composition (or scheme of arrangement), submitted by A. B. the debtor in the above insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by duly instructed pleader with your proofs.

Judge.

FORM No. 9.

FORM UNDER SECTION 38

List of creditors for use at meeting held for consideration of composition or scheme.

(Title)

Meeting held at _____ this _____ day of _____ 19 ____.

No.	Name of all creditors whose proofs have been admitted.	Here state as to each creditor whether he voted, and, if so, whether personally or by pleader.	Amount of assets	Amount of admitted proof.
		Total .		

Required number of majority _____

Required value _____

Rs. _____

FORM No. 10.

FORM OF NOTICE UNDER SECTION 64.

Notice to persons claiming to be creditors of intention to declare final dividend.

(Title.)

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the _____ day of _____ 19 ____ or such later day as the Court may fix, your claim will be expunged, and I shall proceed to make final dividend without regard to such claim.

Dated this _____ day of _____ 19 ____.

G H.,

Receiver,

(Address).

To X. Y.

FORM No. 11.

ORDER ANNULLING ADJUDICATION UNDER SECTION 35.

(Title.)

On the application of R. S. of _____, and on reading _____ and hearing _____ it is ordered that the order of adjudication, dated against A. B., of _____ be, and the same is hereby, annulled.

Dated this _____ day of _____

19 ____ Judge.

FORM No. 12.

NOTICE TO CREDITORS OF APPLICATION FOR DISCHARGE.
[SECTION 41.]

(Title.)

Take notice that the above-named insolvent has applied to the Court for his discharge, and that the Court has fixed the day of 19 at o'clock for hearing the application. Dated this day of 19 .

Judge

NOTE—On the back of this notice the provisions of section 12 (1) of the Insolvency Act, V of 1920, should be printed.

FORM No. 13.

ORDER OF DISCHARGE SUBJECT TO CONDITIONS AS TO EARNINGS,
AFTER-ACQUIRED PROPERTY AND INCOME.

SECTION 41 (c).

(Title.)

On the application of , adjudged insolvent on the day of 19 ; and upon taking into consideration the report of the Official Receiver (or Receiver) as to the insolvent's conduct and affairs and hearing A. B. and C. D., creditors :

It is ordered that the insolvent (a) be discharged forthwith or

(b) be discharged on the or

(c) be discharged subject to the following conditions as to his future earnings, after-acquired property and income :—

After setting aside out of the insolvent's earnings, after-acquired property and income, the yearly sum of Rs. for the support of himself and his family the insolvent shall pay the surplus, if any (or *such portion of such surplus as the court may determine*), of such earnings, after-acquired property and income to the Court or Official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall on the first day of January in every year or within fourteen days thereafter, be filed in these proceedings by the insolvent setting forth a statement of his receipts from earnings, after-acquired property and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account.

Dated this

day of

19 .

Judge.

FORM No. 14

SUMMARY ADMINISTRATION.

SECTION 74.

(Title.)

Notice to Creditors.

Take notice that on the day of 19 , the abovenamed debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 the Court being satisfied that the property of the debtor is not likely to exceed Rs. 500 in value directed that the debtor's estate be administered in a summary manner and appointed the day of

19 for the further hearing of the said petition and the examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in the Court on or before that date.

Given under my hand and the seal of this Court the day
of 19 .

Judge.

FORM No. 15

Register of persons adjudicated insolvents

Serial No.	Name of insolvent.	Date of adjudication.	Date or period fixed for application for discharge	Name of Receiver.	Security taken from the Receiver (if any).	Assets, with estimated value.	Liabilities, with estimated value (secured or unsecured debts to be shown separately).	REMARKS

Abstract of Receiver's reports showing progress of realizations of assets and distribution of dividends and abstract of all important orders of the court after adjudication.

Date	Receiver's Report (give brief purport).	Orders of the Court on the Receiver's report	Other important orders passed by the Court after adjudication, with dates thereof

MADRAS HIGH COURT.

[Notification published in the "Fort St. George Gazette" of the
25th April, 1922.]

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling, and with the previous sanction of His Excellency the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act.

I. **Title and application.**—These Rules may be called "The Madras Provincial Insolvency Rules, 1922," and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May 1922 and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II. **Forms.**—The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III. **Definition.**—(1) In these Rules, unless there is anything repugnant in the subject or context, "the Act" means the Provincial Insolvency Act, 1920 ;

"the Court" includes a Receiver when exercising the power of the Court in accordance with section 80 of the Act ;

"Receiver" means a Receiver appointed by the Court under section 56 (1) of the Act ;

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act ;

"proved debt" means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act.

IV. **Cause title and number.**—(1) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to the petition and all subsequent proceedings on the petition shall bear that number.

V. **Creditor to furnish copies of his petition.**—(1) When an insolvency petition presented by a creditor is admitted, the creditor shall within seven days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial Officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order

fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served.

VI. Particulars in debtor's petition.—The particulars to be given under section 13 (1) of the Act shall be in Form No. 2.

VII. Death of debtor before hearing of petition.—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons.

VIII. Proof of debts.—(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 3 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorized by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the court by registered post to the person making the claim within seven days from the date of the order.

IX. Schedule of creditors.—As soon as the schedule of creditors has been framed a copy thereof shall, if a Receiver or *Interim* Receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the Receiver or *Interim* Receiver.

X. Consideration of compositions and schemes of arrangement.

(1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

XI. Appointment of, and security from, Receiver and *Interim* Receiver.—(1) Every appointment of a Receiver or *Interim* Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed.

(2) Every Receiver or *Interim* Receiver other than an Official Receiver shall be required to give such security as the Court thinks fit.

(3) The Court shall not require an Official Receiver to give security.

(4) In cases where the Official Receiver is empowered to make orders of adjudication, he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending and

may apply that he may be appointed Receiver for the property of the insolvent.

(5) The Court may thereupon appoint the Official Receiver to be Receiver for the property of the insolvent and, unless it sees fit to do so, it shall not be necessary to give notice of the application to any person.

Provided that any party to the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place.

XII. Removal or discharge of Receiver or *Interim* Receiver.—

(1) The Court may remove or discharge any Receiver or *Interim* Receiver other than an Official Receiver, and any Receiver or *Interim* Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any book, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIII. Receiver or *Interim* Receiver an officer of the Court.—

Every Receiver or *Interim* Receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XIV. Applications by Receiver or *Interim* Receiver.—(1) Every application to the court made by a Receiver or an *Interim* Receiver shall be in writing.

(2) The Court may order the notice of any application by the Receiver or *Interim* Receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XV. Remuneration of Receivers.—(1) The remuneration of Receivers or *Interim* Receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five *per centum* of the amount of the dividends.

(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 38 (7) of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVI. Receiver's report.—(1) Unless the Court otherwise directs, the Receiver or *Interim* Receiver shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge draw up a report upon the cause of the debtor's insolvency, the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings, and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured

liabilities and, if so, whether that fact is due to circumstances for which the debtor cannot justly be held responsible, (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency, (c) whether the debtor has continued to trade after knowing himself to be insolvent, (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it, (e) whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities, (f) whether the debtor has brought on, or contributed to, his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs, (g) whether the debtor has within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due given an undue preference to any of his creditors, (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditor, and (i) whether the debtor has concealed or removed his property or any part of it or has been guilty of any other fraud or fraudulent breach of trust.

(2) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

XVII. Debtor to furnish accounts.—Unless the Court otherwise directs, the debtor shall furnish the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed the Court may direct, provided that the Receiver or *Interim* Receiver shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XVIII. Receiver's accounts.—(1) The Receiver or *Interim* Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The accounts of Official Receivers shall be audited annually by the Accountant-General.

(3) The costs of such audit, calculated at 12 annas per Rupees one hundred on the amount realized since the last audit of the estate concerned, shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place, shall be reserved for such payment from the amount otherwise available for distribution.

XIX. Distribution of dividends.—(1) No dividend shall be distributed by a Receiver without the previous sanction of the Court.

(2) Notice in Form No. 8 or Form No. 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and if the amount does not exceed Rs. 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend.

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made.

XX. Application for discharge.—(1) An application for discharge shall not be heard until after the schedule of creditors has been framed.

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than seven days before the date fixed for the hearing, a notice stating the grounds of his opposition to the discharge.

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor; and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor, in person or by pleader, who has served the prescribed notice.

XXI. Notices.—(1) The notices to be given under sections 19 (2), 30, 37 (2), 38 (1) and 41 of the Act shall be published in the *Fort St. George Gazette* in English, in the District Gazette in English and in the language of the Court and in such other manner, if any, as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notices to be given under sections 19 (2), 38 (1) and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal, or the hearing of the application for discharge as the case may be.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by Registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date.

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their

debts and may, if the Court so directs, be served on any or all such creditors by registered post.

(5) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than fourteen days before the said date.

(6) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date.

(7) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(8) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that claim may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No. 3.

XXII. Costs.—(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them; but when an order of adjudication has been made, the costs of the petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the petitioning creditor is required to pay shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay.

(3) The cost of the publication in the Gazette of—

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor, be paid by the creditor, and, when the petition is by debtor, be paid out of the sum deposited in Court by the debtor under rule XXII (2).

(b) Notice of a proposal for a composition under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor.

(4) The publication in the Gazette of—

(a) Notice of adjudication under section 30.

(b) Notice to creditors whose claims have been notified but not proved under section 64.

(c) Notice of an order annulling an adjudication under section 31 shall be free of charge.

(5) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court-refuses to approve the composition or scheme.

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or *Interim* Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds, or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied, in the first place, towards the repayment of such advances, with interest thereon at 6 per cent. per annum.

XXIII. Summary administration.—If the Court makes an order under section 74 of the Act that the debtor's estate be administered in a summary manner.

(a) the petition and all subsequent proceedings shall be endorsed "Summary Case."

(b) the Receiver or *Interim* Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act, nor institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f) nor mortgage nor pledge any part of the property of the debtor under clause (g).

XXIV. Inspection of proceedings.—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or *Interim* Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

XXV. Maintenance of registers.—All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received, (2) insolvency petitions disposed of, and (3) proceedings in insolvency subsequent to orders of adjudication in the Forms Nos. 4, 5 and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No. 7.

XXVI. Maintenance of registers.—In addition to the registers prescribed in rule XXV, Official Receivers shall maintain (1) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos. 10, 11 and 12, appended to these rules.

XXVII. Expenditure on journeys undertaken for purposes of administration.—Expenditure incurred by an Official Receiver and his staff on journeys undertaken for the purpose of administration will be recoverable by the Official Receiver from the assets of the estate or estates concerned in accordance with the rules made by the High Court from time to time on that behalf.

XXVIII. Proceedings by or against a firm.—(1) When any petition, notice or other document is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall add also his signature in the following manner, "B and Co., by A. B., a partner in the said firm."

(2) Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

(3) When a firm of debtors files an insolvency petition, the same shall contain the names in full of the individual partners, and, unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

(4) When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

(5) An order of adjudication shall be made against the partners individually.

(6) The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs.

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